Supreme Court, U.S.
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No. 03- 03 392

IN THE

Supreme Court of the United States

GEORGE PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

v.

THE SARATOGA COUNTY CHAMBER OF COMMERCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may disregard tribal sovereign immunity in determining if an Indian tribe is an indispensable party to a suit that is likely to significantly prejudice the tribe's interests?

PARTIES TO THE PROCEEDING

This proceeding originated as two separate actions that were consolidated in New York Supreme Court, Albany County. George Pataki, in his capacity as Governor of the State of New York, and the New York State Racing and Wagering Board, were defendants in the first action and are petitioners before this Court. Governor Pataki and the State of New York were defendants in the second action and are petitioners before this Court.

The Saratoga County Chamber of Commerce, Inc.; Joseph Dalton; New Yorkers for Constitutional Freedoms, Ltd.; Lee Karr, individually and as chairman of The Coalition Against Casino Gambling; G. Stanford Bratton, individually and as coalition coordinator for the Western New York Coalition Against Casino Gambling; Hon. Frank Padavan, a member of the New York State Senate; and Hon. William Parment, a member of the New York State Assembly, were plaintiffs in the first action and are respondents before this Court. Keith L. Wright, a member of the New York State Assembly, and Larry B. Seabrook, a former member of the New York State Senate, were plaintiffs in the second action and are respondents before this Court.

Judith Hard, a former deputy counsel to the Governor, is no longer a party to this proceeding.

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The Opinion of the New York Court of Appeals, dated June 12, 2003 and electronically reported at 2003 N.Y. LEXIS 1470, is set forth in Appendix A. The Opinion of the New York Appellate Division, Third Department, dated May 2, 2002 and reported at 740 N.Y.S.2d 733 (N.Y. App. Div. 2002), is set forth at Appendix B. The unreported Decision and Order of the New York Supreme Court, Albany County dated April 10, 2001 is set forth at Appendix C. The Opinion of the New York Appellate Division, Third Department, dated August 24, 2000 and reported at 712 N.Y.S.2d 687 (N.Y. App. Div. 2000), is set forth at Appendix D. The unreported Decision and Order of the New York Supreme Court, Albany County dated March 8, 2000 is set forth at Appendix E. The letter from the Supreme Court of the United States, Office of the Clerk, regarding Justice Ginsburg's action on petitioners' stay application, dated July 29, 2003, is set forth at Appendix F.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the New York Court of Appeals pursuant to 28 U.S.C. § 1257(a). The order of the Court of Appeals was entered on June 12, 2003.

STATEMENT OF THE CASE

A. Introduction

This case presents the critical question of whether Indian tribal sovereign immunity – a right long recognized by this Court and central to tribal self-governance – retains any vitality in determining whether an action to which a tribe is

a necessary party may proceed. In this matter seeking invalidation of a gaming compact between the State of New York and an Indian tribe, the New York Court of Appeals refused to dismiss the case despite the tribe's absence. It held that the tribe, which operates a casino pursuant to the compact, was not an indispensable party because it had chosen not to participate in the action.

This complete disregard of the tribe's sovereign immunity conflicts with the decisions of numerous other federal and state courts that have addressed this issue. Five federal circuit courts of appeals, including the Second, Seventh, Ninth, Tenth, and District of Columbia Circuits, as well as the New Mexico Supreme Court, have given substantial, even dispositive weight to tribal immunity in determining that litigation directly prejudicing a tribe's interests could not proceed where the tribe did not consent to join that litigation. In ruling to the contrary, the New York Court of Appeals joins a growing number of courts in departing from the legal standard embraced by the majority of lower courts and required by this Court's tribal immunity precedents.

B. Facts and Procedural History

In 1993, then-Governor Mario Cuomo and the St. Regis Mohawk Tribe signed a tribal-state compact authorizing the Tribe to operate a casino on its reservation in northern New York State. *See Saratoga County Chamber of Commerce, Inc. v. Pataki*, 740 N.Y.S.2d 733, 734 (N.Y. App. Div. 2002). Pursuant to 25 U.S.C. § 2710(d)(8) (a provision of the Indian Gaming Regulatory Act), the United States Assistant Secretary of the Interior, Indian Affairs, approved the compact in December 1993. *See* Notice of Approved Tribal-State Compact, 58 Fed. Reg. 65272 (1993). In April 1999, the Tribe

opened its thirty-million dollar casino pursuant to the compact. *See Saratoga*, 740 N.Y.S.2d at 734; *see also* Record on Appeal, at 409-412. In May 1999, the Tribe and the State signed an amendment authorizing the Tribe to operate certain electronic games; this amendment expired in May 2000. *See Saratoga*, 740 N.Y.S.2d at 734.

In September 1999, respondents brought two actions (later consolidated) in New York Supreme Court, Albany County challenging the gaming compact and the amendment. *See id.* at 735. They alleged, *inter alia*, that the compact and amendment were invalid because the New York Legislature had not approved them. *Id.* They sought a declaration that the compact and the amendment were void, as well as an injunction barring petitioners from taking any further actions to implement them. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 2003 N.Y. LEXIS 1470 (June 12, 2003) (App. A, 5a).[1]

In March 2000, Supreme Court granted petitioners' motion to dismiss, holding that the Tribe was an indispensable party that would be substantially prejudiced by the continuation of the action (App. E, 105a-111a).[2]

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1. Numbers in parentheses followed by "a" are citations to pages in the attached appendix.

2. N.Y. C.P.L.R. 1001, which governs necessary joinder of parties, provides that persons who ought to be parties to an action if complete relief is to be accorded among the existing parties or those "who might be inequitably affected by a judgment in the action" shall be made parties. N.Y. C.P.L.R. 1001(a) (McKinney 1976). If jurisdiction over such a person can only be obtained by his consent or appearance, the court, "when justice requires," may allow the action to continue without him, taking into consideration (i) whether

(Cont'd)

In August 2000, the Appellate Division, Third Department, reversed, holding that the Tribe was not an indispensable party, rejecting petitioners' other procedural defenses, and remanding the matter to Supreme Court to resolve the merits. *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 712 N.Y.S.2d 687 (N.Y. App. Div. 2000). In April, 2001, Supreme Court invalidated the compact (App. C, 75a-86a). That court's order was adverse to both petitioners and the Tribe, stating, in relevant part:

> [T]he 1993 Tribal-State Gaming Compact and its May 27, 1999 amendment is declared and found to be void and unenforceable as is any Tribal-State Gaming Compact absent Legislative concurrence. The [petitioners] are permanently enjoined from taking any further actions to implement them, including the expenditure of State funds to expand the operation to include the use of electronic gaming compacts with any Indian Tribe without prior legislative concurrence or approval.

(App. C, 85a). In May 2002, the Appellate Division affirmed this order. *Saratoga*, 740 N.Y.S.2d 733.

On June 12, 2003, the New York Court of Appeals, in a 4-3 decision, vacated on mootness grounds that portion of

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(Cont'd)
the plaintiff has another effective remedy, (ii) the prejudice resulting from the nonjoinder to the defendant or the person not joined, (iii) whether and by whom the prejudice might have been or may be avoided, (iv) the feasibility of any protective order, and (v) whether an effective judgment may be rendered in the absence of the person not joined. N.Y. C.P.L.R. 1001(b) (McKinney 1976).

the Appellate Division's order relating to the expired 1999 amendment, and otherwise affirmed the order (App. A, 1a-64a). The majority recognized that "a declaration that the 1993 compact violates the State Constitution" would make the casino operation illegal (App. A, 8a). Nevertheless, the majority held that the Tribe was not an indispensable party to this action because "[a]lthough its interests are certainly affected by this litigation, the Tribe has chosen not to participate" (App. A, 19a-20a). The majority acknowledged "that other courts have held that dismissal is proper when an affected Tribe declines to waive sovereign immunity" (App. A, 22a-23a n.9) (*citing, e.g., American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002)). Without giving any further consideration to the tribe's sovereign immunity, however, the court concluded that "to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit" (App. A, 23a) (citation omitted). The majority also rejected petitioners' other defenses and held that the compact was void because the Legislature had not approved it (App. A, 8a-19a, 24a-28a).

Three of the court's seven judges dissented, noting the prejudice that resulted to the Tribe from respondents' nearly six-year delay in commencing this action, and concluding that the Tribe was an indispensable party (App. A, 44a-54a). The dissenting judges pointed out that because the majority declared the compact void and unenforceable, the Tribe must close the casino or face the possibility of federal enforcement action against it (App. A, 53a n.7), a result that the Appellate Division had not anticipated, *see Saratoga,* 740 N.Y.S.2d at 735. The Court of Appeals' remittitur embodying its

order disposing of the case was dated June 12, 2003 (App. A, 63a-64a).

In an order dated July 11, 2003, Associate Judge Rosenblatt granted petitioners a stay of enforcement of the Court's remittitur until August 1, 2003 to allow petitioners to submit a stay application to this Court. Justice Ginsburg denied petitioners' application for a stay pending certiorari on July 29, 2003, but noted that:

> The Appellate Division, whose order the Court of Appeals affirmed in relevant part, noted that "plaintiffs do not seek to shut down the Tribe's casino located on the Akwesane reservation insofar as it is operated in accordance with the original compact." 293 A.D.2d 20, 22 (N.Y. App. Div. 2002). The application for a stay is denied on the understanding that "operat[ing] in accordance with the original compact" includes continued gaming oversight by the New York State Racing and Wagering Board and continued law enforcement by the New York State Police.

(App. F, 112a-113a).

REASONS FOR GRANTING THE PETITION

I. There Is A Conflict Among The Lower Federal Courts And Highest State Courts On The Question Of Whether Tribal Sovereign Immunity Must Be Accorded Any Significant Weight In Determining Whether A Tribe Is Indispensable To A Pending Action

New York courts, like federal courts, are not permitted simply to disregard Indian tribes' immunity from suit in determining whether to allow a suit that substantially prejudices a tribe to continue in the tribe's absence. As the Court of Appeals acknowledged (App. A, 20a), Indian tribes are immune from suit absent Congressional abrogation or waiver. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). This Court has emphasized that tribal sovereign immunity is a matter of federal law and is not subject to diminution by the states. *Kiowa Tribe*, 523 U.S. at 756. Thus, in litigation that may be prejudicial to tribal interests, tribal immunity is given effect by state and federal rules that authorize dismissal of an action when a necessary party cannot be joined. *See generally* Fed. R. Civ. P. 19(b) (listing factors for determining whether the action should be dismissed when the absent person cannot be made a party); N.Y. C.P.L.R. 1001(b) (McKinney 1976) (same under New York law); *see also* D. Siegel, *New York Practice* § 133, p. 219 (3d ed. 1999) (federal cases under Rule 19 are "pertinent to CPLR 1001(b)"). These rules ensure that plaintiffs cannot circumvent tribal immunity by failing to name the tribe as a defendant and then asserting that the action

can proceed without the tribe. They also protect tribes from being forced to choose between retaining their sovereign immunity and defending an important tribal interest – a "choice" that deprives immunity of any meaning whatsoever.

The Court of Appeals' decision, however, forces the Tribe to make exactly this choice. In invalidating the 1993 gaming compact and thereby jeopardizing continued operation of the Mohawk Tribe's casino, the court recognized that the Tribe's "interests are certainly affected by this litigation" (App. A, 19a), but concluded that "the Tribe could have mitigated that prejudice by participating in the suit" (App. A, 23a) (citation omitted) and that "[n]obody has denied [the Tribe] the 'opportunity to be heard'" (App. A, 22a).[3] Thus, the court required that the Tribe surrender its immunity as the price of defending its interest in the compact.

Numerous federal circuit courts, as well as the New Mexico Supreme Court, have defined tribal immunity far more broadly in such circumstances. In *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986), the District of Columbia Circuit dismissed on indispensable party grounds a tribal cross-claim against the United States that was prejudicial to the rights of two other tribes. The court stated that it rejected

> the notion that the Wichitas' ability to intervene as defendants in the cross-claim . . . mitigated the prejudice of proceeding in their absence.

3. Contrary to the court's view (App. A, 22a), the fact that the Oneida Indian Nation filed an amicus brief in that court in support of petitioners did not diminish the independent right of the Tribe, whose interests were at stake, not to have those interests adjudicated in its absence.

> To intervene, the Wichitas would have had to waive their tribal immunity. It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it.

Id. at 776. The court concluded that dismissal was "mandated by the policy of tribal immunity" because "society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Id.* at 777 (footnote omitted).

Other circuits have adopted the same view of the reach of tribal immunity. In *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989), the Tenth Circuit found an Indian tribe to be an indispensable party to a suit seeking validation of a bingo management contract that the tribe subsequently opposed. Relying upon the D.C. Circuit's analysis in *Wichita*, the Tenth Circuit dismissed the action, observing that "[i]n addition to the effect this action would have on the Tribe's interest in the contract, the suit would also effectively abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without consent." *Id.* at 894.

Likewise, in *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993 (10th Cir. 2001), the court found that absent tribes were indispensable parties in a challenge to an agreement under which those tribes shared federal appropriations with the plaintiff tribe, "even though . . . there is no [other] way to challenge the conduct in question." *Id.* at 1001. The court further stressed as a basis for its decision "the 'strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity.'" *Id.* (quoting *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999)).

The Second Circuit has held that the absence of a necessary party that is immune from suit is all but dispositive in determining whether the action should be dismissed. In *Fluent v. Salamanca Indian Lease Authority*, the Second Circuit dismissed an action seeking to void a lease renewal agreement to which the Seneca Nation was a party, on the grounds that the Nation was both immune from suit and indispensable. 928 F.2d 542, 548 (2d Cir.), *cert. denied*, 502 U.S. 818 (1991). Citing both *Wichita* and *Enterprise Management*, the court held that when an indispensable party is immune from suit, "there is very little room for balancing of other factors . . . because immunity may be viewed as one of those interests compelling by themselves." *Id.* (citations and internal quotations omitted). *See also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968) (in deciding whether to dismiss, some factors may be "compelling by themselves"). As in *Wichita*, the court found that dismissal was required by the policy of tribal immunity. *Fluent*, 928 F.2d at 548 (quoting *Wichita*, 788 F.2d at 777).

The Seventh Circuit has assigned similar weight to sovereign immunity. In *United States ex rel. Hall v. Tribal Development Corp.*, 100 F.3d 476 (7th Cir. 1996), the court held that an Indian tribe was an indispensable party to an action against a gambling equipment vendor seeking to void its equipment supply contracts with the tribe. The court emphasized that "[a] plaintiff's inability to seek relief . . . does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity." 100 F.3d at 480 (citation omitted).

The Ninth Circuit, in a challenge similar to the one presented here, also dismissed an action claiming that the

governor of Arizona lacked authority to enter into new gaming compacts with Indian tribes or extend existing ones. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002). The court held that the Indian tribes were indispensable parties, according the tribes' immunity substantial weight. As the court noted, it had "regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Id.* at 1025 (citation omitted).[4] *See also Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) (the ability to intervene is not a factor that lessens prejudice where intervention would require the absent tribe to waive sovereign immunity).

Likewise, the New Mexico Supreme Court has held that "'the public interest in protecting tribal sovereign immunity surpasses a plaintiff's interest in having an available forum for suit.'" *New Mexico ex rel. Coll v. Johnson*, 990 P.2d 1277, 1280 (N.M. 1999) (quoting *Srader v. Verant*, 964 P.2d 82, 91 (N.M. 1998)). Thus, the New Mexico court dismissed on indispensable party grounds an action challenging the legal validity of tribal-state gaming compacts, *Coll*, 990 P.2d at 1280, and other gaming litigation that implicated tribal interests, *Srader*, 964 P.2d at 91-92; *but see New Mexico*

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4. The Ninth Circuit reached the same result in numerous other cases. *See Dawavendewa v. Salt River Project Agric. Impr. and Power Dist.*, 276 F.3d 1150 (9th Cir.), *cert. denied*, 123 S.Ct. 98 (2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000), *cert. denied*, 532 U.S. 966 (2001); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995) (allowing mandamus action against the governor to proceed without the tribe).

The substantial weight accorded tribal sovereign immunity in these decisions directly conflicts with the New York Court of Appeals' complete disregard of tribal immunity in the decision below. These courts recognized, as the Court of Appeals did not, that state or federal procedural rules regarding the joinder of parties cannot abrogate or diminish Indian tribal sovereign immunity by essentially ignoring it. The manifest prejudice to the Tribe from this action made it an indispensable party; since its federal sovereign immunity precluded its joinder, the action should have been dismissed.

A grant of certiorari at this juncture is particularly appropriate because the Court of Appeals' decision exacerbates a pre-existing split of authority on this question. The Wisconsin Court of Appeals, acknowledging this conflict, sided with the decision of the New York intermediate appellate court below in this case. *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474, 486 (Wis. Ct. App.), *review denied*, 655 N.W.2d 129 (Wis. 2002) (quoting *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 712 N.Y.S.2d 687 (N.Y. App. Div. 2000)). That court concluded that concerns about the lack of remedy should the case be dismissed far outweighed any intrusion on a tribe's sovereign immunity, and allowed an action challenging the governor's authority to enter into new gaming compacts or renew existing ones to proceed. *Id.* at 486-87; *see also People ex rel. Lungren v. Comm. Redev. Agency, City of Palm Springs*, 65 Cal. Rptr. 2d 786 (Cal. Ct. App.), *review denied*, 1997

Cal. LEXIS 6503 (Oct. 15, 1997) (tribe not indispensable party to action challenging agency's contract to transfer land to the tribe in exchange for a portion of gaming revenues).[5]

II. The Decision Below Is Of Significant Public Importance To New York And Other States

Certiorari is also warranted in this case because the scope of sovereign immunity in the circumstances presented here is of significant importance to New York and the tribes located within the state, as well as to other States and tribes that enter into tribal gaming compacts or other agreements. As the dissenting judges at the Court of Appeals recognized (53a), that court's decision jeopardizes the Mohawk Tribe's continued operation of its reservation casino. *See, e.g., United States v. Santee Sioux Tribe,* 135 F.3d 558, 561 (8th Cir.) (enforcement action by National Indian Gaming Commission in the absence of a compact), *cert. denied*, 525 U.S. 813 (1998); *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1290-91 (D.N.M. 1996) (U.S. Attorney warned tribes that continued casino gaming following a state court ruling that

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5. The conflict is further deepened by other decisions of the Tenth Circuit and two district courts holding that a tribe is not indispensable where the participation of the United States as a party can provide the views of the absent tribe. *See Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001); *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Ca. 2002); *Connecticut ex rel. Blumenthal v. Babbitt*, 899 F. Supp. 80 (D. Conn. 1995); *see also United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998) (concluding that a tribe was not indispensable in the tribal president's action to invalidate casino contracts where the tribe supported invalidation and was seeking similar relief in two other actions).

the compacts were not validly executed was unlawful and risked criminal sanctions), *aff'd*, 104 F.3d 1546 (10th Cir.), *cert. denied*, 522 U.S. 807 (1997). Moreover, at least one other challenge to the validity of a tribal-state gaming compact is pending in New York State, *see Peterman v. Pataki*, No. CA 03-00914 (N.Y. App. Div.) (compact between New York and the Oneida Indian Nation of New York), and the court's decision threatens to deny this tribe the benefits of sovereign immunity as well. Finally, the issue presented here is also critical to Indian tribal governments and States nationwide that have entered into or are negotiating class III gaming compacts. As of July 2001, the Secretary of the Interior had approved 212 Class III gaming compacts in 24 states. *See Indian Gaming Regulatory Act: Oversight Hearing on the Implementation of the Indian Gaming Regulatory Act Before the Senate Comm. on Indian Affairs*, 107th Cong. 10 (2001) (statement of Sharon Blackwell, Deputy Commissioner of Indian Affairs, Dep't of the Interior).

Prompt resolution of this conflict is essential to clarify the parameters of tribal sovereign immunity and avoid its further diminution in circumstances where a tribe's interests may be prejudiced by pending litigation. Otherwise, Indian tribes nationwide will have no protection against the impermissible "Hobson's Choice" of being forced to waive their immunity in order to defend important tribal interests when their gaming compacts or other important interests are challenged.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION AND REMITTITUR OF THE STATE OF NEW YORK COURT OF APPEALS DECIDED JUNE 12, 2003

STATE OF NEW YORK
COURT OF APPEALS

3 No. 42

(Action No. 1)

Saratoga County Chamber of Commerce Inc., et al.,

Respondents,

v.

George Pataki, as Governor of the State of New York, et al.,

Appellants.

(Action No. 2)

Keith L. Wright, & c., et al.,

Respondents,

v.

George Pataki, as Governor of the State of New York, et al.,

Appellants.

Appendix A

ROSENBLATT, J.:

On this appeal we address the authority of the Governor to enter into agreements with Indian Tribes to permit casino gaming on Indian reservations. Plaintiffs are legislators, organizations and individuals opposed to casino gambling. In challenging the Governor's authority, they contend that by negotiating and signing the agreements without legislative authorization or approval, Governor Mario M. Cuomo in 1993 and Governor George E. Pataki in 1999 violated the principle of separation of powers under the State Constitution (*see* N.Y. Const art III, § 1; art IV, § 1).[1] In response, the Governor and the other defendants (collectively, the State) argue that plaintiffs may not bring this action for a variety of procedural reasons and that in any event the agreements were consistent with the separation of powers. After setting forth the background of the case, we address the procedural issues and then turn to the merits.

I. Factual and Statutory Background

On October 15, 1993, then-Governor Cuomo entered into the "Tribal-State Compact Between the St. Regis Mohawk Tribe and the State of New York." The compact, which underlies this appeal, is the outgrowth of the Federal Indian Gaming Regulatory Act (IGRA) (25 USC §§ 2701-2721; 18 USC §§ 1166-1168), and allows the Tribe to conduct gambling, including games such as baccarat, blackjack,

1. Plaintiffs additionally argue that allowing Las Vegas-style gaming violates the State constitutional prohibition against gambling (*see* N.Y. Const art I, § 9). For reasons that follow, we need not address that argument at this time.

craps and roulette, on the Akwesasne Reservation in Franklin County.

Congress passed IGRA in response to the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians* (480 US 202 [1987]), which held that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (25 USC § 2701[5]). IGRA provides statutory authorization for the establishment of Indian casinos, attempts to regulate the gaming so as to avoid "corrupting influences" and seeks to ensure that the Indian Tribes are the primary beneficiaries of the gaming (*see* 25 USC § 2702).

IGRA requires a compact between a Tribe and the State before the Tribe will be permitted to conduct "Class III" gambling, which includes the Las Vegas-style gaming at issue here.[2] When a Tribe requests that a compact be negotiated, a State is required to do so in good faith (*see* 25 USC § 2710[d][3][A]). The compact should resolve such matters

2. IGRA creates three classes of wagering games. Class I games are those "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" (25 USC § 2703[6]). Class II gaming includes bingo and card games (excluding banking card games) that are operated in accordance with state law limits on the amount of wagers and hours of operation (*see* 25 USC § 2703[7]). Class III gaming includes all other forms of gambling (*see* 25 USC § 2703[8]).

as the applicability of State laws at the casinos, State taxation of gambling revenues, remedies for breach of contract and "any other subjects that are directly related to the operation of gaming activities" (25 USC § 2710[d][3][C][i]-[vi]). IGRA authorizes compacts only in "State[s] that permit[ ] such gaming for any purpose by any person, organization, or entity" (25 USC § 2710[d][1][B]).

According to the terms of the 1993 compact, the New York State Racing and Wagering Board, the New York State Police and the St. Regis Mohawk Tribal Gaming Commission were vested with gaming oversight. Law enforcement responsibilities fell under the cognizance of the State Police, with some law enforcement matters left to the Tribe. As required by IGRA, the compact was approved by the United States Department of the Interior before it took effect.

The Tribe opened its casino on April 10, 1999. On May 27, 1999, Governor Pataki[3] and the Tribe executed an amendment to the 1993 compact. The Interior Department approved the amendment, which allowed the casino to operate *electronic* class III games, including keno. By its terms, the amendment expired on May 27, 2000, one year after it was signed. Although the Governor and the Tribe later agreed to two additional amendments, the Interior Department disapproved them. As a result, there is no authorization in effect allowing the Tribe to operate electronic gaming. Nevertheless, the parties inform us that electronic gaming continues at the casino.

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3. Deputy Counsel Judith Hard signed the amendment on behalf of the Governor.

Appendix A

Shortly after the 1999 amendment took effect, plaintiffs brought suit alleging that the 1993 compact and the 1999 amendment violated the separation of powers and the constitutional gambling prohibition. They sought a declaration that the 1993 compact and the 1999 amendment were unconstitutional, and an injunction prohibiting the State from expending any money in furtherance of the agreements. They also asked the court to enjoin the Governor from taking any further unilateral action (such as signing a successor to the 1999 amendment) that would extend gambling in the State.

By judgment dated March 10, 2000, Supreme Court dismissed the action for plaintiffs' failure to join the Tribe as an indispensable party (*see generally* CPLR 1001). On appeal, the Appellate Division reversed, concluding that the Tribe was not an indispensable party. The Court noted that a contrary ruling would put Indian gaming compacts beyond constitutional challenge or review (*see Saratoga County Chamber of Commerce v. Pataki*, 275 A.D.2d 145, 151-154 [2000] ["*Saratoga I*"]). While the Appellate Division acknowledged that the Tribe's interests would be affected by the suit, it determined that, on balance, the Tribe's absence should not prevent the suit from going forward. The Court also rejected the State's statute of limitations, standing and laches defenses (*see id.* at 154-158).

On remand, by order dated April 12, 2001, Supreme Court granted plaintiffs summary judgment. The court declared the 1999 amendment and the 1993 compact void and unenforceable, and enjoined the Governor from taking any further action to reenact an electronic gaming amendment

without legislative approval. The Appellate Division affirmed, holding that the Governor's unilateral action deprived the Legislature of its policymaking authority in such areas as "the location of the casino, the gaming that could be carried on there, the extent of State involvement in providing regulation * * * and the fees to be exacted for that regulation" (*Saratoga County Chamber of Commerce, Inc. v. Pataki*, 293 A.D.2d 20, 26 [2002] ["*Saratoga II*"]). The State appealed as of right, bringing up for review the substantial constitutional question presented.

II. Mootness

The jurisdiction of this Court extends only to live controversies (*see Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608*, 72 N.Y.2d 307, 311 [1988]; *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713-714 [1980]). We are thus prohibited from giving advisory opinions or ruling on "academic, hypothetical, moot, or otherwise abstract questions" (*Hearst Corp.*, 50 N.Y.2d at 713-714). Accordingly, where changed circumstances prevent us "from rendering a decision which would effectually determine an actual controversy between the parties involved," we will dismiss the appeal or reverse the lower court order and direct that court to dismiss the action (Karger, The Powers of the New York Court of Appeals § 71[a], at 426 [3d ed]).

A. 1999 Amendment

Plaintiffs' challenges to the 1999 amendment are moot. The amendment expired in May 2000, and in the intervening three years no similar agreement has gone into effect.

A declaration as to the validity or invalidity of the 1999 amendment would therefore have no practical effect on the parties. Granted, a declaration as to the Governor's ability to negotiate amendments to the compact would provide beneficial advice to future officials who will have to make decisions about this casino and other similar projects. This is true, however, of all requests for advisory opinions.

In *Hearst* we recognized that the mootness prohibition is subject to an exception, by which we have discretion to review a case if the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question (*see* 50 N.Y.2d at 714-715; *see also Wisholek v. Douglas*, 97 N.Y.2d 740, 742 [2002]). In that event, a court may reach the moot issue even though its decision provides no practical effect for the parties (*see Hearst*, 50 N.Y.2d at 714-715). Plaintiffs here ask us to apply the *Hearst* mootness exception and reach the validity of the 1999 amendment, arguing that the Governor's two unsuccessful attempts to extend the amendment demonstrate a high likelihood of recurrence. They further contend that the one-year length of both the 1999 amendment and the two proposed amendments makes judicial review impracticable.

These are cogent assertions but we are unpersuaded that this controversy is so likely to evade review as to justify our departure from the standard rules of mootness. We are confident that lower courts, if asked by the parties, will expedite consideration of any future agreement, so as to maximize the chances that a judicial resolution will be available during the operation of the agreement. More importantly, however, in light of our determination with

respect to the 1993 compact (Point VII below), there is no reason to believe that the Executive Branch will execute future agreements unilaterally, and therefore the precise issues presented by plaintiffs' challenge to the 1999 amendment may never again recur. Accordingly, we decline to reach that portion of plaintiffs' suit that challenges the validity of the 1999 amendment, and we vacate that portion of the Appellate Division order that declared the 1999 amendment void and unenforceable.

B. 1993 Compact

Plaintiffs' challenge to the 1993 compact undisputedly presents a live controversy. Without a valid Tribal-State compact, IGRA does not permit the operation of a casino.[4] Therefore, a declaration that the 1993 compact violates the State Constitution speaks to the legality of the casino's operation, and thus affects the rights of each party to this suit. Where, as here, a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot (*see Johnson v. Pataki*, 91 N.Y.2d 214, 222 [1997]).

We now proceed to address plaintiffs' standing.

III. Standing

Standing to sue is critical to the proper functioning of the judicial system. It is a threshold question. If standing is

4. *See* 25 USC § 2710[d][1][C] [authorizing casino gambling on reservations where there is a Tribal-State compact "that is in effect"]; *Seminole Tribe v. Florida*, 517 U.S. 44, 47 [1996]).

denied, the pathway to the courthouse is blocked. The plaintiff who has standing, however, may cross the threshold and seek judicial redress. It is difficult to draw an exquisitely sharp line separating the worthy litigant from one who would generate a lawsuit to advance someone else's cause. The rules governing standing help courts to separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant.

For generations, New York courts have treated standing as a common law concept,[5] requiring that the litigant have something truly at stake in a genuine controversy.[6] We have addressed the issue in a number of contexts, including standing for organizations and associations (*see Matter of Aeneas McDonald Police Benevolent Assn.*, 92 N.Y.2d 326 [1998]; *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761 [1991]), legislators (*see Silver v. Pataki*, 96 N.Y.2d 532 [2001]), voters (*see Schulz v. New York State Executive*, 92 N.Y.2d 1 [1998]) and in challenges to administrative actions (*see Colella v. Bd. of Assessors*, 95 N.Y.2d 401 [2000]; *Rudder v. Pataki*, 93 N.Y.2d 273 [1999]; *Matter of New York Assn. of Convenience Stores*

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5. *See e.g. Society of Plastics* (77 N.Y.2d at 772 [citing *Schieffelin v. Komfort*, 212 N.Y. 520, 530 (1914); *Doolittle v. Supervisors of Broome County*, 18 N.Y. 155 (1858)]); *see also Wein v. Comptroller* (46 N.Y.2d 394 [1979]); *Wein v. Carey* (41 N.Y.2d 498 [1977]).

6. In contrast to our approach, standing in Federal courts rests on both constitutional (*see* U.S. Const art III, § 2, cl 1) and prudential grounds. For a comprehensive treatment of standing in Federal courts, see Erwin Chemerinsky, Federal Jurisdiction 56-114 (3d ed 1991).

v. Urbach, 92 N.Y.2d 204 [1998]; *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668 [1996]).

A number of organizations, legislators and citizen taxpayers are plaintiffs in this action and the State has contested standing as to all of them. Because we conclude that the citizen-taxpayers have standing, it is not necessary to address the State's challenge as to the other plaintiffs (*see County of Rensselaer v. Regan*, 80 N.Y.2d 988, 991 n [1992]).

Unlike other plaintiffs, citizen-taxpayers need not demonstrate an injury-in-fact to acquire standing. Instead, pursuant to State Finance Law § 123-b, a citizen-taxpayer may bring suit to prevent the unlawful expenditure of state funds "whether or not such person is or may be affected or specially aggrieved" by the challenged action. We have noted that while the statute might be read to allow actions when little or no injury has been claimed, courts have been inhospitable to plaintiffs who seek essentially to challenge non-fiscal activities by invoking the convenient statutory hook of § 123-b (*see Transactive Corp. v. N.Y. State Dept of Social Servs.* (92 N.Y.2d 579, 589 [1998]). Accordingly, we have held that a plaintiff's claims must have a "sufficient nexus to fiscal activities of the State" in order to confer standing (*Rudder v. Pataki*, 93 N.Y.2d at 281). A contrary rule would disrupt government operation by posing the threat of litigation to challenge any governmental action.

The task, of course, is to distinguish between cases that present a challenge to the expenditure of money and those that use the expenditure of money as a pretense to challenge

a governmental decision. As we have said, "it is one thing to have standing to correct clear illegality of official action and quite another to have standing in order to interpose litigating plaintiffs and the courts into the management and operation of public enterprises" (*Matter of Abrams v. New York City Tr. Auth.*, 39 N.Y.2d 990, 992 [1976]). Accordingly, a claim that State funds are not being spent wisely is patently insufficient to satisfy the minimum threshold for standing, but a claim that it is illegal to spend money *at all* for the questioned activity likely would provide the plaintiff with standing. Here, the citizen-taxpayers have sufficiently alleged a challenge to the expenditure of State money to withstand the State's motion to dismiss for lack of standing.

Another reason informs our conclusion. Were we to agree with the State and deny standing as to all plaintiffs in this action, an important constitutional issue would be effectively insulated from judicial review, something we cautioned against in *Boryszewski v. Brydges* (37 N.Y.2d 361, 364 [1975]). Plaintiffs allege that the Governor has acted ultra vires, exceeding the grant of authority that the Constitution gives to the Executive Branch. In separation of powers disputes of this kind, there will ordinarily be few who can claim concrete injury resulting from a breach of the constitutional division of authority. As a party to the 1993 compact but not to this suit, the Tribe signed the agreement and twice sought to extend most terms of the 1999 amendment. The Tribe is therefore an unlikely plaintiff. Others who could be considered harmed by casino gambling may be too remotely affected to gain relief in the courts.

The case before us contrasts sharply with *Matter of Colella v. Bd. of Assessors* (95 N.Y.2d 401, 410-411 [2000]), where we denied standing, holding that granting it would "permit challenges to the determinations of local governmental officials having no appreciable public significance beyond the immediately affected parties." The issues in the present dispute are fundamental and of immense public significance.

It follows that our doctrines governing standing must be sensitive to claims of institutional harm. Actions of this type can serve as a means for citizens to ensure the continued vitality of the constraints on power that lie at the heart of our constitutional scheme (*cf. Dairylea Corp. v. Walkley*, 38 N.Y.2d 6, 10 [1975]; *Committee for an Effective Judiciary v. State*, 679 P.2d 1223, 1227 [Mont 1984]; *State ex rel. Howard v. Oklahoma Corporation Commission*, 614 P.2d 45, 52 [Okla 1980]). Thus, where a denial of standing would pose "in effect * * * an impenetrable barrier to any judicial scrutiny of legislative action," our duty is to open rather than close the door to the courthouse (*see Boryszewski*, 37 N.Y.2d at 364; *see also State ex rel. Clark v. Johnson*, 904 P.2d 11 [NM 1995]; *Rios v. Symington*, 833 P.2d 20 [Ariz 1992]; *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 979 [NM 1974]).

Here, the citizen-taxpayer plaintiffs argue that the expenditure of State funds and the use of State regulatory personnel for the casino violate the New York Constitution. If standing doctrine precludes them from bringing this suit, the casino will remain operating indefinitely whether or not the 1993 compact was constitutional. Standing is properly

satisfied here, lest procedural hurdles forever foreclose adjudication of the underlying constitutional issue. We next address the statute of limitations argument.

IV. Statute of Limitations

The State claims that this suit should have been brought as an article 78 proceeding, and that as such, the four-month statute of limitations must be applied and the suit dismissed as time-barred (*see e.g.* CPLR 217; *Solnick v. Whalen*, 49 N.Y.2d 224, 229-230 [1980]). We disagree because article 78 does not provide plaintiffs a way of obtaining the relief they seek. Where "no other form of proceeding exists for the resolution of the claims tendered in the declaratory judgment action, the six-year limitation of CPLR 213 (subd 1) will then be applicable" (*Solnick*, 49 N.Y.2d at 230).

Plaintiffs seek a declaration as to the unconstitutionality of the 1993 compact and an injunction against the use of State funds to implement it. That relief cannot be afforded under CPLR article 78. The closest remedy contained in article 78 is prohibition, where an official is proceeding "without or in excess of jurisdiction" (CPLR 7803[2]). We have held, however, that article 78 may not be used against executive officials, and plaintiffs would therefore have been unable to use article 78 to prevent the Governor from signing the compact (*see Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 147 [1983]; *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 13 [1976]; *see also Sears v. Hull*, 961 P.2d 1013, 1016-1017 [Ariz 1998]). Accordingly, the article 78 statute of limitations does not apply. That being so, plaintiffs' declaratory judgment action falls within

the residuary six-year statute of limitations period under CPLR 213(1) (*see Vigilant Ins. Co. v. Housing Auth.*, 87 N.Y.2d 36, 42 [1995]; *see also Solnick*, 49 N.Y.2d at 230; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3001:18, at 446).

The 1993 compact was signed on October 15, 1993, and published in the Federal Register on December 13, 1993. IGRA provides that a compact is not "final" until published in the Federal Register (25 USC § 2710[d][1][A][iii]). Plaintiffs filed suit on September 23 and 24, 1999. The actions were therefore commenced within the limitations period. A suit brought in compliance with the statute of limitations may nonetheless be barred by laches, so we proceed to address that issue.

V. Laches

Laches and limitations are not the same. Limitations involve the fixed statutory periods within which actions must be brought, while laches signifies a delay independent of statute (*see* Siegel, N.Y. Prac § 36, at 44 [3d ed 1999]; 2A Carmody-Wait § 13:4, at 94 [2d ed 2001]). The Court has defined laches as an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party (*see Matter of Barabash*, 31 N.Y.2d 76, 81 [1972]; *see also Dreikausen v. Zoning Bd. of Appeals*, 98 N.Y.2d 165, 173 n 4 [2002]). The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches (*see Galyn v. Schwartz*, 56 N.Y.2d 969, 972 [1982]; *Sorrentino v. Mierzwa*, 25 N.Y.2d 59 [1969]; *Skrodelis v. Norbergs*, 272 A.D.2d 272 [2d Dept 2000]).

The defense has been applied in equitable actions and declaratory judgment actions (both of which are governed by the six-year catch-all provision of CPLR 213[1]) where the defendant shows prejudicial delay even though the limitations period was met.[7]

The State claims that the nearly six-year delay between the effective date of the 1993 compact and the start of this suit has prejudiced the Tribe. The Appellate Division refused to consider the effect of any prejudice to the Tribe, concluding that the State lacked the authority to raise a claim of prejudice on behalf of a non-party. We conclude that the State has the power to argue that prejudice to a non-party bars this action, but that in this instance there has been no prejudice to the Tribe warranting dismissal.

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7. *See Krieger v. Krieger* (25 N.Y.2d 364 [1969]); *Calhoun v. Millard*, 121 N.Y. 69 [1890]; *Guibord v. Guibord* (2 A.D.2d 34, 36 [1st Dept 1956]); Weinstein-Korn-Miller, *supra*, § 3001.19, at 30-152 to 30-153; Siegel, N.Y. Prac § 36, at 45 [3d ed 1999] [citing *Feldman v. Metropolitan Life Ins. Co.*, 259 App. Div. 123 (1st Dept 1940)]; *id.* § 438, at 711; 24C Carmody-Wait § 147:129, at 140 (2d ed 2001); Eager, The Declaratory Judgment Action § 9, at 41-44 (1971); Annotation, *What Constitutes Laches Barring Right to Relief in Taxpayers' Action*, 71 ALR2d 529 [1960]; Annotation, *Statute of Limitations or Doctrine of Laches in Relation to Declaratory Actions* (151 ALR 1076 [1944]); *see also Town of Cortlandt v. Village of Peekskill* (281 N.Y. 490, 498 [1939] [denying a laches defense to a challenge of a village charter, citing intervening legislative action as excusing the delay in bringing suit]; *Am. Dock Co. v. City of New York*, 174 Misc. 813 [1940], *affd* 261 App.Div. 1063 [1st Dept 1941], *affd* 286 N.Y. 658 [1941]).

Appendix A

In *Schulz v. State of New York* (81 N.Y.2d 336, 348-350 [1993]), we held that the prejudice caused by sales of bonds between the effective date of a law authorizing those bonds and the institution of the challenge to the law (one year later) was sufficient prejudice to bar the action. The Court held that the impact on the State as well as on the investors, "with whom the State engaged in these multimillion dollar financing transactions," was enough to spell out laches. We thus recognized that harm to economic interests can be enough to bar an action on laches grounds, even if the delay does not affect a defendant's ability to defend against a suit.

Nowhere in the present case, however, is there any indication that the delay in bringing this action has caused the slightest harm to the Tribe. Plaintiffs point out that the Tribe has been operating the casino — and presumably profiting from it — during the entire pendency of this suit (*cf. Marcus v. Village of Mamaroneck*, 283 N.Y. 325, 332 [1940] [noting in a zoning dispute that "the delay of plaintiffs has afforded defendants many years of unlawful use"]). While in *Schulz* the delay could have caused bond investors to lose the opportunity for investments were the bonds to be invalidated, here there is no comparable risk. True enough, had the casino been shut down on its grand opening, the investment would have been lost. But the casino has been operating for four years, and there is nothing on this record to indicate how much money the casino has made during the pendency of this action. Without knowing how much, if anything, the casino stands to lose — and having no basis to conclude that it has not profited — we cannot dismiss a suit on laches' grounds for economic prejudice.

Appendix A

Plaintiffs argue that the Tribe was on notice as to the possible illegality of the compact, citing a memorandum from Governor Cuomo's counsel indicating that the Tribe had been informed that legislative approval would be required before the State could enter into effective compacts.[8] Thus, while

8. In pertinent part, the memorandum reads as follows:

> "The compacts assign largely to one existing State agency — the Racing and Wagering Board — the State's 'regulatory and oversight' power. The Board would (1) have access to all gaming facilities and business and accounting records; (2) receive daily inspection reports and patron complaints; (3) certify the Nation's gaming employees; (4) register all enterprises that will provide gaming services, supplies and equipment to the Nation; (5) meet four times a year with the Nation to discuss the regulatory enforcement program; and (6) decide whether to allow new games or activities not included [*sic*] a compact. In order to carry out its new duties, the Board must adopt new rules and regulations.
>
> "Only the legislature, however, can direct the Board to undertake the new Indian gaming regulatory duties required by the compacts. *Equine Practitioners Ass'n, Inc. v. New York State Racing and Wagering Board*, 105 A.D.2d 215, 219 (1984), *aff'd as modified on other grounds*, 66 N.Y.2d 786 (1985) ("an administrative agency, as a creature of the legislature, is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.") And, only the legislature can empower the Board to adopt the new rules and regulations that will be required in order for the Board to supervise Indian

(Cont'd)

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gaming. *See, Beer Garden, Inc. v. New York State Liquor Authority*, 79 N.Y.2d 266, 276 (1992) (a State agency's rule-making authority must be granted to it by the Legislature).

"Nothing in existing law confers on the Board — expressly or by necessary implication — the authority to supervise Indian gaming, including the authority to adopt new rules and regulations to be required.

* * *

"We have long recognized the need for legislative action to implement the compacts. The Governor has consistently taken the position that the legislature would have to authorize the State to implement compacts that require the State to regulate and oversee Indian gaming. That is why the Governor submitted a program bill in 1990 and 1991, seeking authority from the legislature to negotiate and enter into compacts with any Indian tribe or nation. And, that is why, from the outset of negotiations with the St. Regis-Mohawk Tribe in 1990, and with the Nation last summer, the State's negotiators told their Indian counterparts that *legislative approval would be required before the State could enter into effective compacts.*

* * *

"The State cannot fulfill its regulatory responsibilities under the compacts without clear legislative authorization for the State agencies that must implement them. Absent such authorization, there is a substantial likelihood that the State's regulatory authority would be challenged * * * *" (emphasis added).

the casino is presumably expected to make large sums over the next several years, and while plaintiffs' suit threatens that source of revenue, the prejudice caused by a loss of expected profits based on a predictably vulnerable compact is not the sort of prejudice that supports a defense of laches. Were it otherwise, very few suits would proceed past laches analysis, and certainly no suits seeking to invalidate illegal contracts would be allowed to proceed.

There is another important distinction between *Schulz* and this case. In *Schulz*, the State approved a bond program to raise revenue. Investors bought bonds expecting the State to pay back the investment with interest. To maintain fiscal credibility as a borrower, the State must uphold its contracts, particularly when it has borrowed funds on credit. We recognized that entertaining a suit challenging the authority of the State to issue those bonds — particularly after a year's delay — might hinder the State's ability to raise financing in the future, to say nothing of the effects on budget projections that invalidation of a source of revenue would cause (*see Schulz*, 81 N.Y.2d at 347-348 [noting "the profound destabilizing and prejudicial effects from delay * * * (that) must be examined for their impact on the State, on the operation and maintenance of orderly government, on those with whom the State engaged in these multimillion dollar financing transactions, and on society in general"]). None of those factors is present here.

VI. The Tribe as an Indispensable Party

The Tribe is not a party to this action. Although its interests are certainly affected by this litigation, the Tribe

has chosen not to participate. Unless Congress provides otherwise, Indian Tribes possess sovereign immunity against the judicial processes of States (*see e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 [1978]; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 [1940]; *Turner v. United States*, 248 U.S. 354, 358 [1919]). As a result, New York courts cannot force the Tribe to participate in this lawsuit. The State claims that the Tribe's absence requires us to dismiss this action. We disagree.

CPLR 1001 sets forth the rules governing when joinder of parties is necessary to continue an action affecting the rights of those parties. The statute directs that persons must be brought into the action when joinder is necessary to accord "complete relief" between the parties, or when the interests of the person might be "inequitably affected by a judgment in the action" (CPLR 1001[a]). Where a person who should be joined nevertheless cannot be joined, courts must decide whether the action can proceed without the "necessary" party. Parties who must be joined lest the action be dismissed are termed "indispensable parties." CPLR 1001(b) provides five factors for courts to consider in deciding whether to dismiss an action where, as here, "jurisdiction over [the necessary party] can be obtained only by his consent or appearance."

> "1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> "2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

"3. whether and by whom prejudice might have been avoided or may in the future be avoided;

"4. the feasibility of a protective provision by order of the court or in the judgment; and

"5. whether an effective judgment may be rendered in the absence of the person who is not joined" (CPLR 1001[b]).

The State relies principally on subsection 2, and argues that the prejudice to the Tribe caused by a judgment eviscerating the authority under which they operate the casino should be sufficient to dismiss the action. In contrast, plaintiffs rely on subsection 1, arguing that there can be no remedy for the alleged constitutional violation if the Tribe's absence requires dismissal.

Plaintiffs' arguments are on firmer ground. Not only will these plaintiffs be stripped of a remedy if we hold that the Tribe is an indispensable party, but no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances.

There are two principal purposes of requiring dismissal owing to the absence of an indispensable party. First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects

the otherwise absent party who would be "embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard" (*First Nat'l Bank v. Shuler*, 153 N.Y. 163, 170 [1897]; *see generally*, Weinstein-Korn-Miller, New York Civil Practice § 1001.01 [2002]).

Neither purpose applies here. The Tribe has chosen to be absent. Nobody has denied it the "opportunity to be heard"; in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the Tribe had it chosen to participate. While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe (*see Keene v. Chambers*, 271 N.Y. 326, 330 [1936]; *Plaut v. HGH Partnership*, 59 A.D.2d 686 [1st Dept 1977]; Weinstein-Korn-Miller, N.Y. Civil Practice § 1001.10 [citing cases]). While we fully respect the sovereign prerogatives of the Indian Tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court.

The CPLR 1001 factors are meant to be balanced as appropriate under each case's unique circumstances. The Appellate Division concluded that the equities weighed against dismissal, and that conclusion was not an abuse of discretion. While in other cases sovereign immunity might support dismissal,[9] here the factors weigh toward allowing

9. We recognize that other courts have held that dismissal is proper when an affected Tribe declines to waive sovereign immunity

(Cont'd)

judicial review of this constitutional question (*see generally* Siegel, N.Y. Prac § 133 ["Dismissal of the action for nonjoinder of a given person is a possibility under the CPLR, but it is only a last resort"] [footnote omitted]).[10]

We conclude that the alleged constitutional violation will be without remedy if this action is dismissed for the Tribe's nonjoinder. We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit (*cf. United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F3d 1249, 1252 [8th Cir 1998]). The Tribe's nonjoinder is therefore excused, and we proceed to discuss the merits.

(Cont'd)

(*see e.g. Am. Greyhound Racing, Inc. v. Hull*, 305 F3d 1015, 1025 [9th Cir 2002]; *Dawavendewa v. Salt River Project*, 276 F3d 1150, 1162 [9th Cir 2002]; *Manybeads v. United States*, 209 F3d 1164, 1166 [9th Cir 2000]; *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 [10th Cir 1989]). Our review of the CPLR 1001 factors, informed by New York's policy disfavoring dismissal, convinces us that we should not follow those cases.

10. For cases holding that an Indian Tribe's absence due to sovereign immunity should not result in dismissal, see e.g. *Kansas v. United States* (249 F3d 1213 [10th Cir 2001]); *Sac and Fox Nation v. Norton* (240 F3d 1250 [10th Cir 2001]); *Artichoke Joe's v. Norton* (216 F Supp 2d 1084, 1090-1091 [CD Cal 2002]); *Dairyland Greyhound Park, Inc. v. McCallum* (655 NW2d 474, 487 [Wis Ct App 2002]).

Appendix A

VII. Separation of Powers

Article III of the State Constitution vests the Senate and the Assembly with the legislative power of the State, while article IV vests the executive power in the Governor and article VI vests the court system with the judicial power (*see* N.Y. Const art III, § 1; art IV, § 1; art VI, § 1). We have recognized that these "separate grants of power to each of the coordinate branches of government" imply that each branch is to exercise power within a given sphere of authority (*Clark v. Cuomo*, 66 N.Y.2d 185, 189 [1985]). Stated succinctly, the separation of powers "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 [1995] [citing *Matter of New York State Health Facilities Assn. v. Axelrod*, 77 N.Y.2d 340, 349 (1991)]).

This is not to say that the functions of government can be neatly boxed into judicial, executive and legislative categories. The distinctions are often elusive, and the fluid functioning of government requires that the interactions among the three branches be allowed some "play in the joints" (*Bain Peanut Co. v. Pinson*, 282 US 499, 501 [1931]; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579, 635 [1952] [Jackson, J., concurring]; *Matter of Richardson*, 247 N.Y. 401, 410 [1928]).

It thus falls to the courts, and ultimately to this Court, to determine whether a challenged gubernatorial action is "legislative" and therefore ultra vires. In this case we have no difficulty determining that the Governor's actions were policymaking, and thus legislative in character.

Initially, we hold that IGRA does not preempt State law governing which State actors are competent to negotiate and agree to gaming compacts. IGRA imposes on "the State" an obligation to negotiate in good faith (25 USC § 2710[d][3] [a]), but identifies no particular State actor who shall negotiate the compacts; that question is left up to State law (*see Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1557 [10th Cir 1997], *cert. denied* 522 US 807 [1997]). As the Supreme Court noted, the duty to negotiate imposed by IGRA "is not of the sort likely to be performed by an individual state executive officer or even a group of officers" (*Seminole Tribe v. Florida*, 517 US 44, 75 n 17 [1996] [citing *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan 1992)]).

IGRA itself contemplates that States will confront several policy choices when negotiating gaming compacts (*see Yavapai-Prescott Indian Tribe v. Arizona*, 796 F Supp 1292, 1296-1297 [D Ariz 1992]). Congress provided that potential conflicts may be resolved in the compact itself, explicitly noting the many policies affected by tribal gaming compacts. Indeed, gaming compacts are laden with policy choices, as Congress well recognized.

> "Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to —
>
> "(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

"(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

"(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

"(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

"(v) remedies for breach of contract;

"(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

"(vii) any other subjects that are directly related to the operation of gaming activities" (25 USC § 2710[d][3][C]).

Compacts addressing these issues necessarily make fundamental policy choices that epitomize "legislative power." Decisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multi-member, representative Legislature is entrusted to perform under our constitutional structure.

Additionally, as noted by Governor's counsel in 1993, the compacts require the State Racing and Wagering Board

to adopt new regulations for carrying out its casino oversight responsibilities. The choice of *which* agency shall regulate an activity can be as fundamental a policy decision as choosing the substance of those regulations. For that reason, and because agencies are creatures of the Legislature, the Constitution requires that agencies carry out only those duties assigned them by the Legislature expressly or by necessary implication (*see Matter of Beer Garden, Inc. v. New York State Liquor Auth.*, 79 N.Y.2d 266, 276 [1992]). There is no legislative authorization for State agencies to promulgate regulations for the oversight of casino gambling. The compacts therefore have usurped the Legislature's power.

The State argues that by passing certain appropriation bills, the Legislature has signaled its approval of the compact. We disagree. Those enactments are no substitute for approval or total ratification. The Legislature has been free to ratify the compact but, as yet, has not done so. Indeed, the State Assembly in a resolution expressly opposed the Governor's unilateral action in negotiating and signing the compact. The resolution asked the Secretary of the Interior not to approve any compact unless approved by the Legislature. The Assembly stated that "[a]ny compact permitting casino gambling necessarily requires at a minimum the exercise of legislative power with respect to regulatory appropriations and related police powers," and that therefore "[t]he Governor lacks authority to act on behalf of the State to enter into a Tribal-State compact" (Res of Assembly A 2413 [1996]). This expression does not square with the State's claim that the Legislature has impliedly approved the compact.

Unsurprisingly, every State high court to consider the issue has concluded that the State Executive lacks the power unilaterally to negotiate and execute tribal gaming compacts under IGRA.[11] New Mexico, Kansas and Rhode Island have each concluded that gaming compacts incorporate policy choices reserved for the Legislature (*see State ex rel. Clark v. Johnson*, 904 P.2d 11 [NM 1995]; *State ex rel. Stephan v. Finney*, 836 P.2d 1169 [Kan 1992]; *Narragansett Indian Tribe v. Rhode Island*, 667 A.2d 280 [RI 1995]; *see also McCartney v. Attorney General*, 587 NW2d 824, 827 [Mich.App 1998], *appeal denied* 601 NW2d 101 [Mich 1999] ["[T]he Governor has the ability to enter into compacts with Indian tribes, subject to the approval of the Legislature"]). Today we join those states in a commitment to the separation of powers and constitutional government.

VIII. The Constitutional Anti-Gambling Provision

The parties have argued the applicability of the State Constitution's anti-gambling provision (N.Y. Const art I, § 9). In light of our disposition of the separation of powers question, it is unnecessary for us to reach that argument, and there are compelling reasons not to do so at this time. Indeed, anything we would say in that regard would be dictum, inasmuch as the separation of powers point is an independent ground for invalidating the compact.

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11. Mississippi allows its Governor the unilateral authority to negotiate and sign compacts (*see Willis v. Fordice*, 850 F Supp 523 [SD Miss 1994], *affd without opn* 55 F3d 633 [5th Cir 1995]). The Mississippi Constitution, however, vests residual powers with the Governor. By contrast, New York places residual policymaking responsibility with the Legislature.

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Neither the trial court nor the Appellate Division addressed the anti-gambling provision, and it is unwise for us — as a court of last resort — to initiate the discussion. Supreme Court did not discuss the article I, section 9 constitutional issue at all, and the Appellate Division made only a reference to it. Clearly, it is better for this Court not to resolve constitutional questions unaddressed by the lower courts (*see Bernstein v. Bodean*, 53 N.Y.2d 520, 529-530 [1981]; *Comiskey v. Arlen*, 43 N.Y.2d 696, 698 [1977]; *see also Schiavone v. City of New York*, 92 N.Y.2d 308, 317 [1998]).

Judge Read's arguments in favor of the compact's compatibility with article I, section 9, and the contrary views of Judge Smith, strengthen our belief that further development of the issue by the courts below is desirable, if not necessary. Judge Read and Judge Smith debate the applicability of *Cabazon* to the article I, section 9 issue. While their insights are illuminating, we note that the lower courts did not cite, let alone address, *Cabazon* or other possibly relevant cases. They did not determine whether the compacts could survive an article I, section 9 challenge. The Appellate Division's reference to the provision did not involve the treatment that should precede this Court's review of an issue of that magnitude. The question of the compact's compatibility with the Constitution's anti-gambling provision is far too important for us to address in this legal vacuum. Furthermore, the parties have informed us that a case pending before the lower courts squarely addresses the question of the applicability of the State Constitution's anti-gambling provision.

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Accordingly, the order of the Appellate Division should be modified, with costs to plaintiffs, by vacating on the ground of mootness so much of the order as declared the May 27, 1999 amendment to the 1993 Tribal-State Gaming Compact void and unenforceable and, as so modified, affirmed.

Appendix A

SMITH, J. (concurring in part and dissenting in part).

I agree with the Majority that the 1993 Compact violates the New York State Constitution in that the Legislature and not the Governor is given policy making authority. In addition, because article I, § 9 of the New York State Constitution clearly forbids the gambling permitted by the 1993 Compact, I would reach that issue.[1]

As noted by the Court's opinion, the New York State Constitution authorizes the Legislature and not the Governor to set policy. It reads:

> "The legislative power of this state shall be vested in the senate and the assembly "(N.Y. Const art III, § 1). "The executive power shall be vested in the governor * * *." (N.Y. Const art IV, § 1). "The Governor shall communicate by message to

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1. I agree with the Majority that the plaintiffs have standing under State Finance Law § 123-b. I agree with the Appellate Division that several organizations, having alleged cognizable harm to their members, also have standing. As stated by the Appellate Division in its August 24, 2000 opinion: "New Yorkers for Constitutional Freedoms is a not-for-profit corporation representing approximately 1,650 churches and groups throughout the State whose individual members are opposed to casino gambling and support the constitutional operation of government. The Coalition Against Casino Gambling is a not-for-profit association whose individual members reside primarily in the Catskills and are opposed to casino gambling in that region. Similarly, the Western New York Coalition Against Casino Gambling is an unincorporated association representing religious organizations and grassroots citizens who oppose casino gambling in this State" (275 A.D.2d 145, 155-156).

> the legislature at every session the condition of the state, and recommend such matters to it as he or she shall judge expedient. The Governor shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed" (N.Y. Const art IV, § 3).

It is equally true, however, that the Constitution forbids gambling, except for limited exceptions, and prohibits commercialized gambling. It reads:

> "[E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section" (N.Y. Const art I, § 9[1]).

Before the first New York State Constitution was written in 1777, gambling in New York was forbidden. Colonial

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Governor Tryon was appointed by the King of England in February 1771.[2] He served as Governor until after the Revolution began, leaving office on March 23, 1780. The commission and instructions issued to Tryon upon his appointment prohibited gambling, referred to as "lotteries:"

> "Whereas, a practice hath of late years prevailed in several of our colonies and plantations in America of passing laws for raising money by constituting public lotteries, and whereas, it hath been represented unto us that such practice doth tend to disengage those who become adventurers therein from that spirit of industry and attention to their proper callings and occupations on which the public welfare so greatly depends, and whereas, it further appears that this practice of authorizing lotteries by acts of legislature hath been also extended to the enabling private persons to set up such lotteries, by means whereof great frauds and abuses have been committed, it is therefore our will and pleasure that you do not give your assent to any act or acts for raising money by the institution of any public or private lotteries whatever until you shall have first transmitted unto us by one of our principal secretaries of state a draught or draughts of such act or acts, and shall have received our direction thereupon."

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2. Governor William Tryon took his oath of office on July 9, 1771.

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The original Constitution of 1777 does not mention gambling or lotteries. Lotteries were again specifically prohibited in the Second Constitution, approved in 1821. Article 7 § 11 provided: "No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law."

In the Third Constitution, approved in 1846, Article 1 § 10 prohibited gambling in almost identical language to the previous Constitution: "nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state."

The Fourth Constitution, approved in 1894, specifically prohibited gambling in Article 1 § 9. In addition to prohibiting lotteries and gambling in general, this section singled out pool-selling and bookmaking as well. It read: "nor shall any lottery or the sale of lottery tickets, pool-selling, book making, or any other kind of gambling hereafter be authorized or allowed within this state."

In 1938 the Fifth and current Constitution was approved. This Constitution maintained the general prohibition against gambling but did authorize a limited range of gambling. Article 1 § 9(1) provides:

> "except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state * * * may be authorized and prescribed by the legislature."

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Art. 1 § 9(2) provides:

> "any city, town or village within the state may by an approving vote of the majority of the qualified electors * * * voting on a proposition * * * at a general or special election * * *, subject to state legislative supervision and control, * * * conduct * * * the following categories of games of chance"
>
> "(a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random."
>
> "(b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance."

Subdivision two goes on to provide that "only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighters and similar non-profit organizations shall be permitted to conduct such games."

Additionally, subdivision two provides that "[t]he legislature shall pass appropriate laws to effectuate the purposes of this subdivision, [and] ensure that such *games are rigidly regulated to prevent commercialized gambling*" (emphasis added).

Consistent with this latter provision, the Legislature has outlawed most forms of gambling (*see* Penal Law article 225). As noted in the Practice Commentary to article 225, "With certain exceptions, gambling is prohibited by the New York State Constitution [article I, § 9]."

The Indian Gaming Regulatory Act, 25 USC § 2703, does not require that gambling be imposed upon states where it is forbidden. 25 USC § 2701(5) provides:

> "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law *and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity*" (emphasis added).[3]

The Indian Gaming Regulatory Act defines three classes of gaming. Class I gaming means "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" (25 USC § 2703[6]). Class II gaming is defined in 25 USC § 2703(7)(A) which provides:

> "the term 'class II gaming' means —
>
> (i) the game of chance commonly known as bingo
> * * * —

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3. While the dissent cites Connecticut as support for its position that Type III gambling should be permitted here, the Connecticut Constitution does not have anti-gambling provisions similar to those in the New York Constitution.

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including * * * pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that —

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State."

The statute further defines what class II gaming does not include. 25 USC § 2703(7)(B) provides:

"The term 'class II gaming' does not include —

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."

The term Class III gaming is defined in 25 USC § 2703(8) and provides:

> "The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming."

In violation of article 9, § 1, the 1993 Compact authorizes Type III commercial gambling. The preamble to the 1993 Compact, entitled "Tribal-State Compact between the St. Regis Mohawk Tribe and the State of New York" refers to Class III gambling and states "WHEREAS, the St. Regis Mohawk Tribe and the State of New York have mutually agreed, * * * to the following provisions governing the conduct of Class III gaming activities on the lands of the Tribe * * * [to] (b) develop and implement a means of regulation for the conduct of Class III gaming on Indian lands * * *." Section 3(a) of the Compact refers to Appendix A for a list of games to be conducted under the Compact. Included in this list are Baccarat and Blackjack, two games which are specifically carved out as being class III gaming (see 25 USC § 2703[7][B][i] and [8]). Not only does the 1993 Compact authorize Class III gaming, it also involves the State of New York in the investigation and maintenance of the gambling facility. The Tribe is to reimburse the State of New York for its expenses.

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The 1999 Amendment to the Compact was equally violative of the New York State Constitution in that it sought to allow computerized versions of class III gaming. The record indicates that despite the expiration of this amendment and the fact that its validity is a moot issue, the gambling authorized by that amendment continues today and is an issue before this Court.

Type III gaming is against public policy and has been since before this State's first Constitution. Moreover, Penal Law § 225.05 provides, "A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." The Penal Law further defines what constitutes advancing gambling activity:

> "A person 'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus thereof, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation" (PL § 225.00[4])."

California v. Cabazon Band of Mission Indians (480 US 202 [1987])[4] does not negate the more than 200-year-old New York anti-gambling policy. First, the case did not involve a State like New York with a clear anti-gambling policy. In the course of the *Cabazon* opinion, the Supreme Court stated, "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular" (480 US, at 211). Second, no Compact between a state and an Indian tribe was involved. The issue was not, as here, whether a Compact violated the State Constitution but whether a California statute and county ordinances dealing with bingo and other forms of gambling were criminal or civil for purposes of Pub L 280.

A review of the facts in *Cabazon* makes clear that it is distinguishable from the case before us. The Cabazon and Morongo Bands of Mission Indians occupy reservations in Riverside County, Cal. Each Band conducts bingo games, open to the general public, on their reservations. The Cabazon Band also operates a card club for playing draw poker and other card games, which are open to the public.

California, which permits only charitable organizations to play bingo, sought to enforce an anti-bingo statute (Cal.Penal Code Ann. § 326.5 [West Supp.1987]). Riverside County sought to enforce an anti-bingo ordinance and

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4. Nothing requires this Court to await a lower court's view of a case before addressing that case.

ordinances prohibiting draw poker and other card games (Ordinance No. 558 and Ordinance No. 331). The actions of the State and County were taken pursuant to Pub L 280.

The Tribes sued the County in Federal District Court seeking a declaratory judgment that the defendants had no authority to apply its laws inside the reservations and an injunction against their enforcement. The State intervened. The District Court granted the Tribes' motion for summary judgment, holding that neither the State nor the County had any authority to enforce its gambling laws within the reservations. The Court of Appeals affirmed, stating that State laws may be applied to tribal Indians on their reservations if Congress has expressly consented.[5]

Pub L 280 gave California and five other states jurisdiction over specified areas of Indian lands. California was given broad authority to enforce its criminal laws on Indian lands. It was given only limited authority to enforce its civil laws on Indian lands so as not to attempt a total assimilation of Indian tribes, which retain attributes of sovereignty, into American society. The question in this case was whether the anti-gambling laws were primarily criminal or civil in nature.

The Court of Appeals distinguished a state's "criminal/prohibitory" laws and state "civil/regulatory" laws as follows: "if the intent of a state law is generally to prohibit certain

5. Under 18 USC 1162 and 28 USC 1360, Congress expressly granted six States the right to enforce their laws (both civil and criminal) over Indian tribes: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin.

conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/ regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation" (480 US, at 209).

In affirming, the U.S. Supreme Court agreed with this distinction while noting this "is not a bright-line rule" and left room for the argument that the bingo statute is prohibitory rather than regulatory (*Id.* at 210). Thus, the Supreme court concluded that the California statutes and ordinances regulating gambling were regulatory and civil, and not criminal and prohibitory, for purposes of Pub L 280.

Finally, I agree with the Appellate Division that the commercialized gambling authorized by the 1993 Compact is a clear violation of the Constitution.[6] That court stated:

> "Under the circumstances, we conclude that the commercialized Las Vegas style gambling authorized by the compact is the antithesis of the highly restricted and 'rigidly regulated' (N.Y. Const, art I, § 9[2]) forms of gambling permitted by the N.Y. Constitution * * * disfavoring gambling." (*Saratoga County Chamber of Commerce Inc. v. Pataki*, 293 A.D.2d 20, 24 [2002]).

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6. The petitioners in both cases have add.essed article I, § 9, arguing that it prohibits the gambling authorized by the 1993 Compact.

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The People of the State of New York have decided in New York's Constitution to prohibit commercial gambling.[7] If the elected representatives of the People want to change that policy, they should begin the process of amending the Constitution.[8]

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7. All of those who negotiated the 1993 compact, as well as those who passed budgetary provisions in its support, were well aware of the anti-gambling provisions of the New York State Constitution. The specific gambling permitted in article I, § 9 is in no way authority to permit commercial gambling.

8. Following oral argument in this case, the Attorney General submitted to this Court a Memorandum of Understanding between the State of New York and the Saint Regis Mohawk Tribe. Among the provisions of the Memorandum are (1) a casino to be built in Sullivan County for Class III gambling, (2) the prohibition of any slot machines by entities other than Indian tribes acting pursuant to IGRA in the geographic areas of Bronx, Delaware, Greene, Kings, New York, Orange, Queens, Richmond, Rockland, Sullivan and Ulster counties and (3) payments to New York State of twenty per cent of the proceeds from slot machines for the first four years of a Compact and twenty-five per cent for the period after four years.

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READ, J. (dissenting).

In late 1993, then Governor Mario M. Cuomo signed a tribal-State compact with the St. Regis Mohawk Tribe to regulate Indian gaming at a casino on Indian lands, an activity sanctioned by a unique interaction between federal sovereignty over Indian affairs and our State's Constitution and laws. Six years and millions of dollars later, plaintiffs in effect seek to shut down the casino. Under these circumstances, the claims should have been dismissed because the Tribe is an indispensable party. Disregarding the severe prejudice to the Tribe, our colleagues now hold that the 1993 Compact is void and unenforceable on separation-of-powers grounds. In the absence of a dismissal, we believe that this appeal presents two constitutional issues: we find that Governor Cuomo did not violate the separation-of-powers doctrine by signing the 1993 Compact; the 1993 Compact does not contravene Article 1, Section 9 of the Constitution. Thus, we respectfully dissent.

Indispensable Party

The question of whether an Indian tribe is an indispensable party in a State court suit involving a compact entered into pursuant to the federal Indian Gaming Regulatory Act (IGRA) (25 USC § 2701, *et seq.*) is a matter of first impression for this Court.[1] Other states' appellate courts have considered

1. In cases involving public utilities on tribal lands, the Appellate Division has concluded that sovereign immunity requires dismissal if the underlying dispute implicates "the rights and powers" of the tribe (*see Niagara Mohawk Power Corp. v. Anderson*, 258

(Cont'd)

this issue with mixed results.[2] No other state or federal court, however, has grappled with indispensability in light of the extraordinary delay in bringing suit manifest here.[3]

(Cont'd)

A.D.2d 958 [4th Dep't 1999] [affirming dismissal of complaint because dispute involving electrical service on reservation implicates rights and powers of tribe, and any judgment in its absence would be incomplete], *appeal dismissed* 93 N.Y.2d 958; *Anderson v. Town of Lewiston*, 244 A.D.2d 965 [4th Dep't 1997] [affirming dismissal of counterclaim and denial of motion to intervene because dispute involving water service on reservation implicates rights and powers of tribe, and any judgment in its absence would be incomplete], *appeal dismissed* 91 N.Y.2d 920; *see also Seneca v. Seneca*, 293 A.D.2d 56 [4th Dep't 2002] [affirming denial of dismissal of complaint because dispute over agreement between purchaser and seller for sale of gas station situated on reservation does not implicate rights and powers of tribe]).

2. *Compare State ex rel. Clark v. Johnson* (904 P.2d 11 [NM 1995] [tribe not indispensable under New Mexico law where writ of mandamus sought because performance of act to be compelled not dependent on tribe's will]) and *Dairyland Greyhound Park, Inc. v. McCallum* (655 NW2d 474, 487 [Wis Ct App] 2002 [tribe not indispensable because otherwise "an important legal issue having significant public policy implications will evade resolution"], *rev denied* 655 NW2d 129 [Wis 2002]) *with State ex rel. Coll v. Johnson* (990 P.2d 1277 [NM 1999] [tribe indispensable in non-mandamus action seeking to halt Indian gaming in New Mexico subsequent to passage of legislation authorizing gaming compacts]); *see also Am. Greyhound Racing, Inc. v. Hull* (305 F3d 1015 [9th Cir 2002] [tribe indispensable within meaning of federal rules where district court was asked to decide if Arizona law permits Indian gaming]).

3. *See e.g. State ex rel Clark v. Johnson* (petition filed less than two months after earliest compact executed); *Connecticut ex rel.*

(Cont'd)

A declaratory judgment does not require the Tribe's presence in order to afford complete relief (see *Klostermann v. Cuomo*, 61 N.Y.2d 525, 538-39 [1984]); however, as a practical matter, an adverse declaratory judgment will "inequitably affect" the absent Tribe. Thus, under the facts of this case, the Tribe is a necessary party under CPLR § 1001(a), as the majority agrees.

Because the Tribe is a necessary party whose sovereign immunity prevents joinder, the statutory factors in CPLR 1001(b) must be weighed to determine whether the litigation should continue without the Tribe. The second factor (the prejudice to the Tribe if the claims proceed in its absence) and the third factor (whether and by whom this prejudice might have been or may be avoided in the future) are related and, in our view, dispositive. After all, the Appellate Division acknowledged that the Tribe would have a viable claim for dismissal on the basis of laches if it were a party (*Saratoga*

(Cont'd)

Blumenthal v. Babbitt (899 F Supp 80 [D Conn 1995] [action to enjoin Secretary of Interior from accepting land into trust filed within days after Secretary's announcement of his intention to do so]); *State ex rel. Coll v. Johnson* (by 1999 State's highest court considers challenge based on state gaming legislation enacted in 1997); *Sac & Fox Nation of Missouri v. Norton* (240 F3d 1250 [10th Cir 2001] [action filed within 30 days to challenge Secretary of Interior's decision to acquire land in trust for tribe and to approve gaming activities on land]); *Dairyland Greyhound Park, Inc v. McCallum* (injunction sought to prevent governor from renewing compacts expiring in 2003 and 2004); *Am. Greyhound Racing, Inc. v. Hull* (injunction sought to prevent governor from renegotiating or renewing compacts expiring in 2003).

Appendix A

County Chamber of Commerce v. Pataki, 275 A.D.2d 145, 158 [2000] [*Saratoga I*]).

"Laches is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' * * * The essential element of this equitable defense is delay prejudicial to the opposing party" (*Schulz v. State of New York*, 81 N.Y.2d 336, 348 [1993] *quoting Matter of Barabash*, 31 N.Y.2d 76, 81 [1972]). The 1993 Compact between the Tribe and the State was approved by the Tribe's chiefs on June 9, 1993 and by Governor Cuomo on October 15, 1993. The Assistant Secretary of the Interior, Indian Affairs, approved the 1993 Compact under IGRA on December 4, 1993. The Tribe opened its $30 million casino on April 10, 1999, five years later.

These lawsuits, however, were not commenced until September 1999, nearly six years after the 1993 Compact became final. Plaintiffs have never offered an explanation for their neglect to sue immediately after the Governor signed the 1993 Compact or the federal government approved it. If plaintiffs had sued even reasonably promptly, the Tribe could have avoided or delayed substantial investments of time and money to develop the casino. At the very least, the Tribe would have been put on notice of plaintiffs' separation-of-powers allegations.

Moreover, the majority focuses its discussion of prejudice solely on whether or not "investors" (whoever they may be) have recouped their $30 million investment in four

years (which, of course, is unknowable since the Tribe is not a party to this litigation). The majority ignores that the prejudice to the Tribe comprises more than dollars spent or profits made: our colleagues do not acknowledge the potential economic threat posed by this litigation to the casino's 400-odd employees and to the Tribe's long-term economic prospects.[4] The Tribe has dedicated ten years to the pursuit of gambling as an economic development plan, and cannot now turn back the clock or "put[ ] genies back in their bottles" (*Schulz*, 81 N.Y.2d at 348).

Nor did the Tribe execute the Compact or develop the casino in disregard of a known substantial separation-of-powers vulnerability. Rather, any such litigation risk that the Tribe might arguably have been aware of early on in 1993 was eclipsed by the Legislature's prompt and consistent support of the 1993 Compact.

Specifically, on July 7, 1993, both houses of the Legislature passed the bill that became Chapter 264 of the Laws of 1993 upon the Governor's approval of it on July 13,

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4. As of April 12, 2002, the Tribe employed 418 people at the casino (*see www.mohawkcasino.com*). The 1993 gaming compact between the State and amicus curiae Oneida Indian Nation has been challenged on grounds essentially identical to those here, and the State lost at the trial court for essentially the same reasons (*Peterman v. Pataki*, Sup Ct, Oneida County, July 17, 2002, McCarthy, J., Index No. 99-533 [time to perfect appeal extended until July 16, 2003]). The Oneida opened the Turning Stone Casino near Utica, New York on July 20, 1993. By April 2002, the Turning Stone Casino was reported to employ 3,300 people and to have an annual payroll of $70 million (George Keller, *Gaming "Transformed" Oneida Nation*, Post Standard [Syracuse] April 18, 2002, Neighbors West at 7).

1993. This legislation granted the State Police and the Division of Criminal Justice Services authority to undertake the responsibilities assigned to them by the 1993 Compact, which had been approved by the Tribe's chiefs in the month prior to this legislation's enactment. Section one of Chapter 264 provides in its entirety as follows:

> "In the event it is established that activity authorized under Public Law 100-497 [IGRA] shall be conducted in this state, notwithstanding any inconsistent provision of law, the New York state division of state police, on behalf of the New York state racing and wagering board, shall be granted access to the criminal history records of the division of criminal justice services, pursuant to subdivision 8-a of section 837 of the executive law, in connection with executing the responsibilities of the New York state racing and wagering board and the division of state police in regard to the regulation, oversight, licensing, or certification, including fingerprinting, criminal history record checks and background investigations of persons applying to engage in such activities. The division of criminal justice services shall submit a fingerprint card, along with the subject's processing fee, to the federal bureau of investigation for the purpose of conducting a criminal history search and returning a report thereon."

In addition, the Legislature for six consecutive years appropriated monies annually for the specific purpose of

supporting oversight and regulatory activities assigned in the 1993 Compact to the Racing and Wagering Board and the State Police. These appropriations were made in anticipation of the opening of the Tribe's casino and were enacted by the Legislature even though the opening was delayed.[5]

Moreover, these appropriations were not opaque or tucked away in some obscure corner of the budget: they were included with appropriations for programs managed by the Racing and Wagering Board and the State Police and were separately denominated as "Special Revenue Funds-Other, Miscellaneous Special Revenue Fund-339, Regulation of Indian Gaming Account." Indeed, on July 12, 1993 — five days after both houses of the Legislature passed the bill that became Chapter 264 of the Laws of 1993 — the Director of the Division of the Budget wrote to both the Speaker of the Assembly and the Senate Majority Leader. He informed them, as required by law, of his intention to transfer monies from the special emergency appropriation in the already enacted Fiscal Year (FY) 1993-94 budget to the Board and the State Police "to enable [these agencies] to engage in certain oversight and regulatory activities in relation to Class III gaming operations as set forth in gaming compacts between the [Mohawk and Oneida] Indian tribes and the State. These transfers are being made to the State Miscellaneous Special Revenue Fund, a Special Revenue Funds-Other and will be reimbursed by the Indian tribes."

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5. Three of the four legislator-plaintiffs voted in favor of Chapter 264. None of the legislator-plaintiffs voted against budget bills including the specific appropriations for the Racing and Wagering Board for fiscal years 1994-95, 1995-96, 1996-97 and 1999-00. Only one of the legislator-plaintiffs voted against these budget bills in the remaining fiscal years.

The majority downplays these appropriations. They might have had a point if the Racing and Wagering Board and the State Police had funded responsibilities assigned to them by the 1993 Compact under the authority of a more generic appropriation for agency operations. We wonder, however, how the Executive may ever be said to have acted without proper legislative authorization when carrying out activities for which the Legislature has earmarked funds.

The majority also relies heavily on a memorandum from Governor Cuomo's Counsel to establish that the Tribe had fair warning of the 1993 Compact's potential vulnerability. First, there is no reason to suppose (or, at least, no reason from the record) that the Tribe was contemporaneously aware of this memorandum, which is dated six days after the Tribe's chiefs approved the 1993 Compact. Second, the Governor's Counsel stated that while "the Governor has the legal authority under IGRA and state law to negotiate and sign an Indian Gaming Compact on the State's behalf," implementing legislation was needed for the Racing and Wagering Board to regulate Indian games; the State Police and the Division of Criminal Justice Services to conduct background investigations of casino employees and contractors; and the necessary appropriations.

The Legislature, in fact, enacted the kind of criminal justice legislation referred to by Governor's Counsel (i.e., Chapter 264 of the Laws of 1993) and made the requisite appropriations. The Legislature has never deemed it necessary to adopt legislation to state specifically that the Racing and Wagering Board may regulate games of chance on Indian lands just as it already regulates charitable games of chance

throughout the State (*see e.g.* L 2001, ch 383). Even if we suppose (again, we have no reason to know from the record) that the Tribe was told during negotiations that specific legislative approval or ratification of any tribal-State gaming compact was required to safeguard against a separation-of-powers attack, the Governor obviously changed his view.[6] Instead, he submitted implementing legislation, which the Legislature promptly passed. In sum, the Tribe reasonably relied on the State's collective actions to conclude that the 1993 Compact was valid.

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6. Contemporaneous newspaper accounts — of which the Tribe might have been aware — indicate that Governor Cuomo wanted the Legislature's "response" to the compact that he was negotiating in 1993 with the Oneida Indian Nation before signing it, but that "[s]ome legislators said that [this was] an attempt to shift responsibility for a decision that could spark opposition"; and "[t]here are also questions as to whether the Legislature has any power to veto the compact" (James Dao, *Accord for a Casino in New York State*, N.Y. Times, Mar 10, 1993, at B1). When Governor Cuomo subsequently signed a tribal-state compact with the Oneida, it was reported as "something of a reversal by Mr. Cuomo, who said that the Legislature needed to authorize state regulation of the casino before he could sign a compact," but that "Republican leaders had said Mr. Cuomo was trying to spread political responsibility for gambling, and they refused to debate the issue until Mr. Cuomo signed the compact." It was further noted that "Mr. Cuomo plans to introduce legislation giving him the authority to spend $2.5 million for state police officers and inspectors for Indian casinos." The spokesperson for the Senate majority leader was quoted as having said that " 'We'll look at any legislation that he sends' " (James Dao, *Cuomo Signs Pact with Indians for Casino in Upstate New York*, N.Y. Times, Apr. 16, 1993, at A1). In fact, as noted in the text, the Legislature passed just such legislation.

Finally, IGRA provides that tribes can only conduct class III gaming activities pursuant to a valid compact negotiated with the state in which the tribe is located (25 USC § 2710[d][1][B]). Since the majority has declared the 1993 Compact void and unenforceable, the Tribe must either shut down the casino immediately[7] or conduct class III gaming in violation of IGRA and without any State regulatory oversight. The National Indian Gaming Commission has enforcement authority for IGRA, and can take action ranging from monetary penalties to forced closure of a casino where a tribe is in "substantial violation" of the statute (25 USC § 2713). The Commission did precisely this in *United States v. Santee Sioux Tribe of Nebraska* (135 F3d 558, 560 [8th Cir 1998], cert. denied 525 US 813), where the tribe has been fined $4 Million and forced to discontinue its class III gaming activities after a seven-year legal battle with the State of Nebraska (*see also Pueblo of Santa Ana v. Kelly*, 932 F Supp 1284, 1290-91 [DNM 1996] [noting US Attorney's warning that continuation of gaming activities in absence of valid compact would subject tribes and pueblos to federal criminal sanctions and forfeiture of their gaming devices], *aff'd* 104 F3d 1546 [10th Cir 1997]). The Tribe should not be exposed to the risk of these significant adverse consequences in light of plaintiffs' prolonged delay in bringing these lawsuits.

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7. The Appellate Division did not anticipate this result: "It is important to note that plaintiffs do not seek to shut down the Tribe's casino located on the Akwesane [sic] reservation insofar as it is operated in accordance with the original compact" (*County of Saratoga Chamber of Commerce, Inc. v. Pataki*, 293 A.D.2d 20, 22 [2002] [Saratoga II]).

Appendix A

A finding that the Tribe is an indispensable party in these cases does not establish a per se rule that Indian tribes are indispensable parties whenever a claim is brought in State court involving Indian gaming. For instance, since only four months elapsed between the execution of the 1999 Amendment and the filing of plaintiffs' complaints, the same analysis might have yielded a different result had the 1999 Amendment presented a live controversy.

The Appellate Division concluded in *Saratoga I* that the constitutional nature of plaintiffs' claims outweighed any prejudice to the Tribe, and therefore the Tribe was not indispensable. The majority agrees, although in *Schulz* we held that a citizen-taxpayer's 11-month post-enactment delay in challenging the constitutionality of State financing measures sufficiently disrupted expectations so as to foreclose judicial review. In light of the "profound destabilizing and prejudicial effects from delay" (81 N.Y.2d at 348) caused by these vastly more belated lawsuits, we can only conclude that the Appellate Division abused its discretion as a matter of law when it allowed the suit to continue without the Tribe.

IGRA/Separation of Powers

Our analysis of the merits starts with the Constitution's implied separation-of-powers doctrine which "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 [1995]). The distinction between legislative (policy making) and executive (policy implementing) functions is not black

and white. Rather, "[i]t is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation is violated" (*Clark v. Cuomo*, 66 N.Y.2d 185, 189 [1985]; *Broidrick v. Lindsay*, 39 N.Y.2d 641 [1976]). While the majority labels as critical policy choices various subjects related to the operation of gaming activities and includible in a tribal-State compact, what plaintiffs challenge in these cases is more fundamental; namely, the decision to authorize on-reservation class III Indian gaming.

Any discussion of what "critical policy choices" were available to the Legislature on this score starts with the recognition that Indian commerce is an area "under the exclusive control of the Federal Government" (*Seminole Tribe of Florida v. Florida*, 517 US 44, 72 [1996]). "The traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed" (*Gaming Corp. of America v. Dorsey & Whitney*, 88 F3d 536, 547 [8th Cir 1996], citing *White Mountain Apache Tribe v. Bracker*, 448 US 136, 143 [1980]).

Faced with the question of whether a state could enforce its gambling laws on an Indian reservation, the United States Supreme Court in *California v. Cabazon Band of Mission Indians* (480 US 202 [1987]) reiterated the long-established rule that "Indian tribes retain attributes of sovereignty over both their members and their territory, and that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States" (*id.* at 207) (internal citations omitted). Moreover, "state laws may be applied to

tribal Indians on their reservations [only] if Congress has expressly so provided" (*id.*).

In interpreting pre-IGRA law, the Supreme Court held that if a state merely "regulates" gambling (*i.e.*, through its civil laws), tribes must be allowed to conduct gambling on their reservations free from the state's gambling regulations. If, however, a state "prohibits" gambling (*i.e.*, through its criminal laws), tribes are forbidden from gambling and the state may enforce its laws.

The most controversial aspects of IGRA, which codified *Cabazon* with important modifications and "expressly preempt[ed] the field in the governance of gaming activities on Indian lands" (S Rep No. 446, 100th Cong, 2d Sess, at 6, reprinted in 1988 U.S. Code Cong & Admin News, at 3071, 3076; *see Gaming Corp.*, 88 F3d at 544-549), cover class III gaming activities. These include pari-mutuel horse race wagering, lotteries, banking card games such as baccarat, chemin de fer and blackjack, electronic or electromechanical facsimiles of any game of chance, and slot machines (25 USC § 2703[7][B]; 25 CFR 502.4[d]).[8]

IGRA continues the pro-Indian *Cabazon* holding by providing that class III gaming could be conducted in a "State that permits such gaming for *any* purpose by *any* person, organization, or entity" (25 USC § 2710[d][1][B]) (emphasis added). IGRA also, however, pays heed to states'

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8. We note that neither the 1993 Compact nor the 1999 Amendment authorized the Tribe to possess or operate slot machines at the casino.

apprehensions over unregulated Indian gaming by directing that a tribe can conduct class III gaming *only* pursuant to a "Tribal-State compact entered into by the Indian tribe and the State * * * that is in effect" (25 USC § 2710[d][1][C]).

IGRA also contains enforcement provisions to require that where a state permits class III gaming, it must negotiate in good faith with a tribe for a compact upon the tribe's request (*see Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 [2d Cir 1990], *cert denied* 499 US 975). If negotiations prove fruitless, the tribe can sue the State in federal court. If the state invokes sovereign immunity, the Secretary has authority to mediate the dispute and impose compact terms.[9]

In summary, IGRA mandates that, if a state allows *any* class III gaming by *any* person, a tribe may seek to conduct the same games on their lands. Moreover, the Second Circuit has firmly rejected the notion (unsuccessfully advanced by the State of Connecticut) that a state that allows only charities to engage in regulated casino-type gambling prohibits class III gaming activities for purposes of IGRA (*id.* at 1031-1032). States that allow charities to conduct class III gaming must negotiate in good faith with a Tribe wishing to do the same.

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9. *See* 25 USC § 2710(d)(7) (authorizing tribe to sue state in federal court where state fails to negotiate in good faith); *Seminole Tribe v. Florida*, 517 U.S. 44 [1996] (invalidating IGRA, on Eleventh Amendment grounds, to the extent it allows tribes to sue states in federal court for a failure to negotiate in good faith); and 25 CFR Part 291 (authorizing Secretary of the Interior to mediate and impose compacts if state invokes sovereign immunity); *but see Florida v. United States*, Docket No. 4:99CV137-RH, ND Fla, filed April 12, 1999 [challenging Part 291]).

Appendix A

New York has not outlawed all gambling for more than six decades. For better or worse, New Yorkers have adopted a public policy that permits considerable gambling, although regulated. This public policy is embodied in Article I, Section 9 of the Constitution, which contains statements purporting to ban gambling, but — significantly, for purposes of IGRA — explicitly authorizes four exceptions: 1) pari-mutuel horse racing; 2) a State-operated lottery for education; 3) bingo for certain non-profit organizations; and 4) "games of chance" for these same organizations. Games of chance are defined in the Constitution as follows:

> "games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance."

The Games of Chance Licensing Law (article 9-A of the General Municipal Law) empowers the Racing and Wagering Board to "[s]upervise the administration of the games of chance licensing law and to adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses thereunder and the conducting of games under such licenses" (General Municipal Law § 188-a). Section 186(3) of the General Municipal Law defines "games of chance" to include and exclude specific types of games; and delegates to the Board the authority to add such "other specific games" to the list of approved games of chance as fall within the confines of what is allowed in the Constitution (*i.e.* games

"in which prizes are awarded on the basis of a winning number or numbers, color or colors, symbol or symbols determined by chance"). To similar effect, 9 NYCRR Part 5620.1 lists Board-approved games, but also authorizes "any other game of chance which has been approved in writing by the board." Finally, article 16 of the Tax Law (the New York State Lottery for Education Law) authorizes the Division of the Lottery, among other things, to determine the type of lottery to be conducted (Tax Law § 1604[a][1]).

Plaintiffs do not challenge the constitutionality of any of the 26 specific games of chance listed in the 1993 Compact.[10] Plaintiffs do not contend that any of the games listed in the 1993 Compact are not among the numerous class III games that are already being conducted by non-profit organizations and others in the State. Nor do they dispute the State's evidence that, as of January 12, 2001, the Racing and Wagering Board had issued games-of-chance identification numbers to 6,840 organizations. According to the Board's records for calendar year 1999, 2,125 authorized organizations were licensed to conduct bell jar games of chance. These organizations had a total handle of

10. We express no opinion as to the constitutionality of any of the games included in the 1993 Compact. We note, however, that the question is not whether these games may be characterized as Las Vegas-style or commercialized gambling, but whether a particular game is a "game[ ] of chance" or "lottery" within the meanings of those terms in our Constitution and laws, and requires a detailed analysis of how each game is played (*see e.g. Trump v. Perlee*, 228 A.D.2d 367 [1st Dep't 1996][electronic game, Quick Draw, offered in the State Lottery, contains all essential features of lottery and does not go beyond type of lottery contemplated by Constitution]).

$298,598,154 from which a net profit of $51,646,037 resulted. With respect to other types of games of chance, $1,443,957 in net profits were raised by casino-style gaming from a handle of $3,011,913. According to the Division of the Lottery's Annual Report, in FY 2002-2003 the Division awarded $3.1 billion in prizes. In short, while regulated by the Racing and Wagering Board and the Division of the Lottery, gambling is commonplace in New York notwithstanding Article I, Section 9's general condemnation of it.

When Congress enacted IGRA pursuant to its plenary authority over Indian affairs, it legislated for all 50 states to allow sovereign nations (Indian tribes) to conduct class III gaming activities within States' borders. In this situation, the "critical policy decision" challenged by plaintiffs — to authorize on-reservation class III Indian gaming — derives from the unique interplay between IGRA and our State's Constitution and statutes. The Governor's recognition that class III Indian gaming is mandated in New York by federal law, given policy choices embodied in the New York Constitution and State law, did not constitute policy making. In executing the 1993 Compact, which regulates the Tribe's conduct of class III gaming at its on-reservation casino, the Governor was merely implementing pre-existing federal and State policy choices.

Whatever the case may be in other states, in New York, the Governor enjoys broad powers to enforce legislation and great flexibility in determining the methods of enforcement. For example, we have in recent years affirmed the Governor's authority to create entire new agencies with new duties for consumer advocacy based principally on a legislative policy as general as article 20 of the Executive Law, which

empowers the Consumer Protection Board to "promote and encourage the protection of the legitimate interests of consumers within the state" (*Borquin*, 85 N.Y.2d at 785-786; *see also Clark*, 66 N.Y.2d at 190 [statute providing that State Board of Elections "shall have the power and duty * * * to encourage the broadest possible voter participation in elections" sufficiently articulated legislative policy to support Governor's creation of multi-agency voter-registration program]). The underlying legislative policy decisions here are more robust and detailed than were the legislative policy decisions implicated in *Borquin* and *Clark*. On this record, we find no separation-of-powers violation.

Conclusion

The majority portrays the issues on this appeal as "fundamental and of immense public significance," which demand resolution despite the prejudice to the absent Tribe. The majority then stops short, leaving for another day "the question of the applicability of the State Constitution's anti-gambling provision." Thus, our colleagues prolong constitutional uncertainty and create substantial hardships for the Tribe, not to mention for the casino's employees and the surrounding communities. Moreover, because of the nature of plaintiffs' claims, we do not see how the majority can sidestep deciding whether Article I, Section 9 prohibits class III gaming on Indian lands once the merits are reached.

In their briefs, during the course of two oral arguments and in several post-argument submittals, plaintiffs continuously pressed their position that the class III gaming conducted at the casino under the 1993 Compact is prohibited by Article I, Section 9 of the New York State Constitution.

Simply put, plaintiffs argue (and Judge Smith in his dissent agrees) that in light of Article I, Section 9's ban of "commercialized gambling," the Governor lacks any power to enter into a compact authorizing the Tribe to conduct Las Vegas-style gaming on Indian lands — with or without the Legislature's approval or ratification. The State takes the opposite view.

The majority opines that, *assuming* the Legislature may constitutionally authorize the Governor to enter into a tribal-State compact for on-reservation class III gaming, the Legislature did not do so on the facts presented. In our view, the underlying constitutional issue is ripe for decision in this case once the merits have been reached. Further delay benefits no one — not those who may now seek legislative ratification of existing tribal-State compacts; not those who oppose Indian gaming.

For all the reasons given, we would reverse the order of the Appellate Division and dismiss both complaints.

* * * *

Order modified, with costs to plaintiffs, by vacating on the ground of mootness so much thereof as declared the May 27, 1999 amendment to the 1993 Tribal-State Gaming Compact void and unenforceable and, as so modified, affirmed. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judge Ciparick concur. Judge Smith concurs in part and dissents in part in an opinion, dissenting as to part VIII of Judge Rosenblatt's opinion. Judge Read dissents and votes to dismiss the actions in an opinion in which Judges Wesley and Graffeo concur.

Decided June 12, 2003

Appendix A

STATE OF NEW YORK
COURT OF APPEALS

3 No. 42

(Action No. 1)

Saratoga County Chamber of Commerce Inc., et al.,

Respondents,

v.

George Pataki, as Governor of the State of New York, et al.,

Appellants.

(Action No. 2)

Keith L. Wright, & c., et al.,

Respondents,

v.

George Pataki, as Governor of the State of New York, et al.,

Appellants.

Appendix A

HON. JUDITH S. KAYE, *Chief Judge, presiding.*

The appellants in the above entitled appeal appeared by Hon. Eliot Spitzer, Attorney General of the State of New York; the respondents appeared by O'Connell & Aronowitz and Jay Goldberg, P.C.; and the amicus curiae appeared by William W. Taylor, Esq.

The Court, after due deliberation, orders and adjudges that the order is modified, with costs to plaintiffs, by vacating on the ground of mootness so much thereof as declared the May 27, 1999 amendment to the 1993 Tribal-State Gaming Compact void and unenforceable and, as so modified, affirmed. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judge Ciparick concur. Judge Smith concurs in part and dissents in part in an opinion, dissenting as to part VIII of Judge Rosenblatt's opinion. Judge Read dissents and votes to dismiss the actions in an opinion in which judges Wesley and Graffeo concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Stuart M. Cohen

Stuart M. Cohen, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 12, 2003

APPENDIX B — OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT DATED MAY 2, 2002

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, NEW YORK

May 2, 2002

(Action No. 1.)

SARATOGA COUNTY CHAMBER OF COMMERCE INC. et al.,

Respondents,

v

GEORGE PATAKI, as Governor of the State of New York, et al.,

Appellants.

(Action No. 2.)

KEITH L. WRIGHT et al.,

Respondents,

v

GEORGE PATAKI, as Governor of the State of New York, et al.,

Appellants.

* * *

Appendix B

SUMMARY

APPEAL from an order of the Supreme Court (Joseph Teresi, J.), entered April 12, 2001 in Albany County, which, inter alia, granted plaintiffs' motions for summary judgment and declared the 1993 Tribal-State gaming compact and its 1999 amendment void and unenforceable absent legislative approval.

OPINION OF THE COURT

MERCURE, J.P.

The question on this appeal is whether, as the result of the interaction of gaming policies established by the State's Constitution and statutes and federal law, defendant Governor had the authority to execute a Tribal-State compact and amendment with the St. Regis Mohawk Tribe (hereinafter Tribe), allowing certain class III gaming activities on the Tribe's reservation. We hold that because the basic policy decisions underlying the Governor's action have not been made by the State Legislature, the Governor did not have the authority to bind the State by executing the compact or the amendment.

The Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) (hereinafter IGRA) was enacted in 1988 for the declared purpose of "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" (25 U.S.C. § 2702[1]), while at the same time "provid[ing] a statutory basis for the regulation of

gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players" (25 U.S.C. § 2702[2]). Under IGRA, gaming is divided into three categories. Class III gaming, which is at issue here, is statutorily defined as "all forms of gaming that are not class I gaming or class II gaming" (25 U.S.C. § 2703[8]) and includes pari-mutuel horse race wagering, lotteries, banking card games such as baccarat, chemin de fer, and blackjack, and electronic or electromechanical facsimiles of any game of chance or slot machines of any kind (25 U.S.C. § 2703[7][B]; *see, Hotel Empls. & Rest. Empls. Intl. Union v. Davis,* 21 Cal.4th 585, 596, 981 P.2d 990, 998).

Pursuant to IGRA, Class III gaming activities will be permitted on Indian lands if "located in a State that permits such gaming for any purpose by any person, organization, or entity * * * and conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" (25 U.S.C. § 2710[d][1][B], [C]; *see, Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1256, *amended* 99 F.3d 321, *cert. denied sub nom. Sycuan Band of Mission Indians v. Wilson,* 521 U.S. 1118). Further, as we held on a prior appeal in this case, we look to state law rather than IGRA to determine whether a state has validly bound itself to a compact (275 A.D.2d 145, 157, 712 N.Y.S.2d 687). In 1993, then-Governor Mario Cuomo entered into a Tribal-State compact with the Tribe, which allowed the Tribe to operate gambling casinos. The Tribe opened the Akwesane Mohawk Casino on its reservation near Hogansburg in

Franklin County on April 10, 1999. On May 27, 1999, the Governor and the Tribe entered into an amendment to the compact to permit the operation of electronic gaming devices, and the Tribe began the operation of these devices the following day.[1]

These actions were commenced in September 1999. The complaints allege in pertinent part that the Governor lacked authority to execute the compact or the amendment[2] and that the types of gambling contemplated by both of them are prohibited by the N.Y. Constitution, criminal statutes, and public policy as enunciated by the Legislature. It is important to note that plaintiffs do not seek to shut down the Tribe's casino located on the Akwesane reservation insofar as it is operated in accordance with the original compact. Plaintiffs do seek to prevent any expansion of the casino operation pursuant to the amendment, including the expansion of the gambling activity onto other sites. On the prior appeal, we denied defendants' motions to dismiss the complaints for failure to join an indispensable party, lack of standing or legal capacity to sue, or as barred by the doctrine of federal preemption, the applicable Statute of Limitations, or laches (275 A.D.2d 145, *supra*). Plaintiffs and defendants thereafter moved for summary judgment. Concluding that,

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1. We are advised that the amendment expired by its own terms on May 27, 2000, that the State and the Tribe were unsuccessful in negotiating a substitute provision satisfactory to the Secretary of the Interior, but that the electronic gaming devices continue in operation.

2. Hereinafter, when the context of our discussion requires no distinction between the 1993 compact and the 1999 amendment, the two will be collectively referred to as the compact.

absent legislative concurrence, the Governor's execution of the compact violated the doctrine of separation of powers, thereby rendering it void and unenforceable, Supreme Court denied defendants' motion and granted plaintiffs' motions. Defendants appeal.

We affirm. Fundamentally, "[t]he constitutional principle of separation of powers, implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v. Cuomo,* 85 N.Y.2d 781, 784 [internal quotation marks and citations omitted]; *see, Cohen v. State of New York,* 94 N.Y.2d 1, 11; *Matter of New York State Health Facilities Assn. v. Axelrod,* 77 N.Y.2d 340, 349). Thus, although "there need not be a specific and detailed legislative expression authorizing a particular executive act as long as 'the basic policy decisions underlying the [executive action] have been made and articulated by the Legislature'" (*Bourquin v. Cuomo, supra,* at 785, quoting *Matter of New York State Health Facilities Assn. v. Axelrod, supra,* at 348), "when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, * * * the doctrine of separation is violated" (*Clark v. Cuomo,* 66 N.Y.2d 185, 189; *see, Bourquin v. Cuomo, supra,* at 785; *Boreali v. Axelrod,* 71 N.Y.2d 1; *Rapp v. Carey,* 44 N.Y.2d 157).

The initial task, then, is to ascertain New York's legislative policy on gambling as it existed in the 1990s. Pursuant to N.Y. Constitution, article I, § 9, the only forms of gambling authorized in New York are (1) State-operated pari-mutuel betting on horse races (N.Y. Const., art. I, § 9

[1]), (2) lotteries operated by the State, "the net proceeds of which shall be applied exclusively to or in aid or support of education" (N.Y. Const., art. I, § 9 [1]), and (3) specified "games of chance" conducted only by "bona fide religious, charitable or non-profit organizations of veterans, volunteer fire [fighters] and similar non-profit organizations", and then only if authorized by a majority vote of the electors of the city, town or village in which the gambling is to take place and on the additional conditions that the entire net proceeds be exclusively devoted to the lawful purposes of the organizations and that prizes be limited to $250 for a single prize or $1,000 for a series of prizes (N.Y. Const., art. I, § 9[2]). Notably, N.Y. Constitution, article I, § 9(2) requires the Legislature to "pass appropriate laws to effectuate [its purposes], ensure that [the games of chance] are rigidly regulated to prevent commercialized gambling, [and] prevent participation by criminal or other undesirable elements and the diversion of funds from the [authorized purposes]".

The stated purpose of General Municipal Law article 9-A, which the Legislature enacted pursuant to that constitutional directive, is expressed in the following terms:

> "It is hereby declared to be the policy of the legislature that all phases of the supervision, licensing and regulation of games of chance and of the conduct of games of chance should be closely controlled and that the laws and regulations pertaining thereto should be strictly construed and rigidly enforced; that the conduct of the game and all attendant activities should be so regulated and adequate controls so instituted

> as to discourage commercialization of gambling in all its forms * * * and that the mandate of [N.Y. Constitution, article 1, § 9] should be carried out by rigid regulations to prevent commercialized gambling * * *" (General Municipal I aw § 185).

Under the circumstances, we conclude that the commercialized Las Vegas style gambling authorized by the compact is the antithesis of the highly restricted and "rigidly regulated" (N.Y. Const., art. I, § 9[2]) forms of gambling permitted by the N.Y. Constitution and statutory law and New York's established public policy disfavoring gambling (*see, Ramesar v. State of New York,* 224 A.D.2d 757, 759, *lv. denied* 88 N.Y.2d 811; *accord, Matter of New York Racing Assn. v. Hoblock,* 270 A.D.2d 31, 33-34).

Obviously recognizing that its defense to plaintiffs' separation of powers claim is seriously undermined by New York's long-standing and clearly articulated policy against precisely the type of gambling that the compact authorizes, defendants' primary approach has been to enlist IGRA as evidence of a purported New York policy favoring commercialized casino gambling. Reduced to its essence, defendants' argument is that, because the N.Y. Constitution, statutes and implementing regulations permit every form of gambling authorized by the compact, albeit under rigid controls and limitations not in existence at the Tribe's casino, the "permits such gaming for any purpose by any person, organization, or entity" criterion of 25 U.S.C. § 2710 (d)(1)(B) is satisfied. That being the case, the argument continues, if the Governor had refused to enter into good-faith negotiations culminating in a Tribal-State compact,

IGRA would have authorized the U.S. Secretary of the Interior to impose a compact on the State (*see,* 25 U.S.C. § 2710[d][7]; 25 CFR part 291; *see also, Mashantucket Pequot Tribe v. State of Connecticut,* 913 F.2d 1024, 1032, *cert. denied* 499 U.S. 975; *Yavapai-Prescott Indian Tribe v. State of Arizona,* 796 F. Supp. 1292, 1297-1298). Even accepting these two underlying premises as true, which we do only for the sake of the present argument, we conclude that defendants' argument is nonetheless fatally flawed.

First and most obvious is the fact that the Governor and Congress are not coordinate branches of government, thereby rendering defendants' separation of powers analysis inapt (*see,* N.Y. Const., art. III, § 1; art. IV, § 1; *see also, Clark v. Cuomo,* 66 N.Y.2d 185, 189, *supra*). Although defendants make an attempt to promote this as a "unique" separation of powers case where the challenged executive action supposedly implements existing legislative policy "established through the interplay of policies set by two policy-making bodies—the New York State Legislature and the United States Congress", the fact is that the policy relied upon by defendants derives solely from Federal statutes and implementing regulations. The State Legislature's exclusive role in this matter was to approve highly restrictive statutes and constitutional provisions which, although generally banning gambling and at all times evidencing a strong policy against commercialized gambling, may have unwittingly opened the door to Indian casino gaming through the subsequently enacted IGRA.

Second, defendants' analysis overlooks the critical distinction between the *existence* of a Tribal-State compact

and the *provisions* of such a compact. That is, even if we were to accept the premise that IGRA placed the State in a position where it had no reasonable alternative but to enter into a compact with the Tribe, the fact remains that the Governor lacked authority to define the terms of that compact. As the legislative history of IGRA makes clear, "[a] State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens" (S. Rep. No. 44, 100th Cong., 2d Sess., at 13, reprinted in 1988 U.S.Code Cong. & Admin. News, at 3071, 3083). Here, the Governor's action deprived the Legislature of any input concerning a number of significant elements, including the location of the casino, the gaming that could be carried on there, the extent of State involvement in providing regulation and a regulatory infrastructure and the fees to be exacted for that regulation (*see, Yavapai-Prescott Indian Tribe v. State of Arizona, supra,* at 1296-1297). These numerous collateral issues affecting the health and welfare of State residents implicate policy choices lying squarely within the province of the Legislature.[3]

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3. As we indicated in our prior decision in this case, it is noteworthy that a number of other jurisdictions have considered the question of whether a governor has the authority to bind a state to an Indian gaming compact, and in every state whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence (*see, Jicarilla Apache Tribe v. Kelly,* 129 F.3d 535, 537 [NM]; *Kickapoo Tribe of Indians v. Babbitt,* 827 F.Supp.

(Cont'd)

Appendix B

As a final matter, we note that defendants expressly disavow any opinion as to whether (1) under IGRA, New York must allow "all forms of Indian gaming" because some types of class III gaming are allowed, (2) IGRA preempted the question of whether the Governor's signature was sufficient to bind the State, and (3) the Legislature ratified the compact by appropriating funds for its implementation and granting the State Police access to the criminal history records of the Division of Criminal Justice Services.

The parties' remaining contentions either need not be addressed or have been considered and found to be unavailing.

PETERS, SPAIN, CARPINELLO and LAHTINEN, JJ., concur.

Ordered that the order is affirmed, with one bill of costs.

(Cont'd)

37, 46 [Kan], *revd on other grounds* 43 F.3d 1491; *McCartney v. Attorney General,* 231 Mich. App. 722, 727-728, 587 N.W.2d 824, 827, *lv. denied* 460 Mich. 873, 601 N.W.2d 101; *Narragansett Indian Tribe v. State,* 667 A.2d 280, 282 [RI]; *State ex rel. Clark v. Johnson,* 120 N.M. 562, 574, 904 P.2d 11, 23; *State ex rel. Stephan v. Finney,* 251 Kan. 559, 582-583, 836 P.2d 1169, 1185).

APPENDIX C -- DECISION AND ORDER OF THE NEW YORK SUPREME COURT, ALBANY COUNTY DATED APRIL 10, 2001

STATE OF NEW YORK
COUNTY OF ALBANY
SUPREME COURT

INDEX NO. 5507-99

ACTION NO. 1

SARATOGA COUNTY CHAMBER OF COMMERCE, INC., JOSEPH DALTON; NEW YORKERS FOR CONSTITUTIONAL FREEDOMS, LTD.; LEE KARR, Individually and as Chairman of The COALITION AGAINST CASINO GAMBLING, an Unincorporated Association; G. STANFORD BRATTON, Individually and as Coalition Coordinator for the WESTERN NEW YORK COALITION AGAINST CASINO GAMBLING, an Unincorporated Association; the HON. FRANK PADAVAN, a Duly Elected and Serving Member of the New York State Senate; and the HON. WILLIAM PARMENT, a Duly Elected and Serving Member of the New York State Assembly,

Plaintiffs

-against-

GEORGE PATAKI, as Governor of the State of New York, JUDITH HARD, Deputy Counsel to the Governor; and the NEW YORK STATE RACING AND WAGERING BOARD,

Defendants.

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INDEX NO. 11971-99

ACTION NO. 2

KEITH L. WRIGHT, as Member of the New York State Assembly, and LARRY B. SEABROOK, as member of the New York State Senate,

Plaintiffs,

-against-

GEORGE E. PATAKI, as Governor of the State of New York, and THE STATE OF NEW YORK,

Defendants.

Supreme Court Albany County All Purpose Term, March 6, 2001 Assigned to Justice Joseph C. Teresi

* * *

DECISION AND ORDER
RJI NO. 0199059775

TERESI, J.:

Plaintiffs in Action No. 1 and Action No. 2 as well as defendants all move separately for summary judgment pursuant to CPLR 3212. Plaintiffs in Action No. 1 seek an order:

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(a) Declaring illegal the so-called "Tribal State Compact between the St. Regis Mohawk Tribe and the State of New York" (the "Compact"), purportedly entered into in 1993 pursuant to the federal Indian Gaming Regulatory Act ("IGRA") by then-Governor Mario Cuomo, on behalf of the State of New York, to authorize the St. Regis Mohawk Tribe (the "Tribe") to operate a Las Vegas-style gambling casino on the Tribe's Akewesasne Reservation located in upstate New York;

(b) Declaring illegal an amendment to that Compact, dated May 27, 1999, which expired on May 27, 200 (the "Amendment"), purportedly entered into on behalf of the State by Governor Pataki through his agent, Judith Hard, then Deputy Counsel to the Governor, which purports to allow the Tribe to expand its gaming operation to include the use of "electronic video gaming devices," not permitted under the original Compact; and

(c) Enjoining Governor Pataki and the New York State Racing and Wagering Board (which maintains a presence at the casino on the Reservation on a 24-hour basis in order to oversee its operation and to ensure compliance with the Compact as amended) from taking any *further* action, including the expenditure of State funds, to *expand* the operation to include the use of electronic gaming devices on the Reservation pursuant to the Amendment.

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Plaintiffs in Action No. 2 similarly seek an order:

(1) Declaring that any Tribal-State Gaming Compact signed by the Governor is void and unenforceable absent legislative concurrence;

(2) Declaring that the 1993 Tribal-State Compact signed by the Governor with the St. Regis Mohawk Tribe is void and unenforceable;

(3) Permanently enjoining defendants from entering into, or attempting to enter into, or amending any gaming compacts with any Indian tribe without prior legislative concurrence;

(4) Enjoining defendants from any conduct which would expand Indian gambling activity within the State of New York without prior legislative concurrence;

(5) Awarding plaintiffs their costs, attorney's fees; and

(6) Granting such other and further relief as this Court deems just and proper.

Defendants move for summary judgment in favor of all of the defendants and against all of the plaintiffs upon the grounds that plaintiffs' causes of action are not ripe for judicial review; that there are no triable issues of fact and there is no merit to the causes of action asserted in the complaints and amended complaints.

Appendix C

The history of this case is fully outlined in this Court's previous decision, (*Saratoga County Chambers of Commerce Inc. v. Pataki*, Index No. 5507-99, 11971-99, Alb. Sup. Ct., decided March 8, 2000) and the Appellate Division decision of June 9, 2000. (*Saratoga County Chamber of Commerce Inc. v. Pataki*, __ AD2d __, 712 NYS 2d 687, [3d Dept., 2000]).

Initially, the Court will deny the defendants' motion for dismissal on the grounds that the actions are not ripe for judicial review. Defendants maintain that the 1999 Amendment which permitted the Tribe to conduct electronic gaming has expired and absent a new amendment the Court should decline to rule on the Governor's authority to enter the original 1993 compact prior to a new amendment. The Court is mindful that the Appellate Division's decision (*Saratoga County Chamber of Commerce Inc. v. Pataki*, __ AD2d __, 712 NYS 2d 687, [3rd Dept., 2000]) held that "the public interest would be best served by a determination of this litigation on the merits." That Court disposed of all additional issues (standing claims, preemption under Federal Law, statute of limitations and laches) raised on motions to expedite a determination of the actions on the merits. The Court notes that although the "Amendment" has expired the activity plaintiff seeks to enjoin continues. After a full review of this record and the previous Appellate Division's decision this Court declines to dismiss this matter on the grounds of ripeness.

Therefore, the next issue before this Court is whether the Governor of the State of New York is empowered to enter into a Tribal State Gaming Compact absent legislative

concurrence. This Court, with guidance and authority from the Appellate Division and a full review of the record here determines the Governor does *not* have such authority. As previously stated by the Appellate Division, *id.*, and heavily relied upon by plaintiffs:

> "It is noteworthy, we believe, that a number of other jurisdictions have considered the question of whether a governor has the authority to bind a state to an Indian gaming compact, and in every state whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence (*see, Jicarilla Apache Tribe v. Kelly*, 129 F3d 535, 537; *Kickapoo Tribe of Indians v. Babbitt*, 827 F Supp 37, 46, *revd on other grounds* 43 F2d 1491; *McCartney v. Attorney General*, 231 Mich App 722, 727-728, 587 NW2d 824, 827, *lv denied* 460 Mich 873, 601 NW2d 101; *Narragansett Indian Tribe of R.I. v. Rhode Is:*, 667 A2d 280, 292 [RI]; *State ex rel. Clark v. Johnson*, 120 NM 562, 574, 904, P2d 11, 23; *State ex rel. Stephan v. Finney*, 251 Kan 559, 582-583, 836 P2d 1169, 1185). Further, the Court of Appeals has stated that the fundamental and critical policy decisions of this State are the exclusive prerogative of the Legislature (*see e.g., Bourquin v. Cuomo*, 85 NY2d 781, 784; *Matter of New York State Health Facilities Assn. v. Axelrod*, 77 NY2d 340, 349)."

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As demonstrated, the tribal gambling compacts in Kansas, Michigan, Rhode Island and New Mexico were invalidated (by the highest court of each State) absent legislative concurrence or approval. In those states, as in New York, the state's Constitution does not grant residual powers to the executive to bind the State to an Indian Gaming Compact.

The cases cited by the Appellate Division all have a common and clear theme: that the Governor did not have the authority to bind their states with Indian Gambling Compacts absent legislative concurrence or approval. As stated in *Clark v. Johnson*, 120 N.M. 562 (Supreme Court, New Mexico 1995):

> "Under federal law as expressed in the IGRA, Class III gaming activities are lawful on Indian land only if the State permits such gaming "for any purpose by any person, organization, or entity." The compacts negotiated and signed by the Governor authorize gaming that New Mexico law does not permit. For example, New Mexico law does not permit "all forms of casino-style games" as stated in the recitals in the compact with Pojoaque Pueblo.
>
> In addition, the New Mexico Constitution requires legislative approval or ratification of compacts that are otherwise in conflict with state gambling statutes. Under state constitutional separation of powers, the Governor may neither infringe upon legislative authority with respect to existing law

> nor with respect to the power of the legislature to change law in the future. Residual governmental power rests within the legislature. The specific enabling legislation on which the Governor relies is not applicable.
>
> The IGRA does not purport to expand state gubernatorial power. The Governor's power to negotiate and sign the compacts derives from the state constitution and state statues." *Id.*

This is strikingly similar to the present situation.

Also, in *Stephen v. Finney*, 251 Kan 559. (Supreme Court, Kansas 1992). The Court held the Governor of Kansas had power to negotiate compacts but could not bind the state to the terms, and absent "an appropriate delegation of power by the Kansas Legislature or legislature approval of the compact, the Governor had no power to bind the State to the Terms" of the compact. In *Narragansett Indian Tribe of Rhode Island v. State*, 667 AD2d 280 (Supreme Court, Rhode Island 1995) while holding the governor could not bind the state to a compact that Court held:

> "We also take care to note that our opinion in no way suggests that the Governor, in his capacity as Chief Executive officer of this state, lacks the authority to advocate, to initiate, and to negotiate, short of executing, a tribal-state compact. All that we determine herein is that the Governor, absent specific authorization from the General Assembly, had no express or implied constitutional right or

> statutory authority to finally execute and bind the state to such a compact by his execution thereof. [*Id. at 282*]"

The Court in *McCartney v. Attorney General*, 231 Mich App 722 (Court of Appeals, Michigan 1998) also emphasized that there is no constitutional impediment to the Governor's negotiating with an Indian Tribe where the product of his negotiation has no affect without legislative approval.

Similar to those cases, this Court finds that New York's Governors in signing the Indian Gaming Compacts have crossed the line of executive power and entered into the domain of the legislature without proper mandate or authority within the New York State Constitution.

The Court also finds that this ruling is fully consistent with the position taken by defendant in 1992 in *St. Regis Mohawk Tribe v. State of New York and Mario M. Cuomo*, Case No. 91 CV-1117, SDNY. In that case St. Regis Mohawk Indian Tribe filed a lawsuit alleging that the Governor failed to negotiate the terms of the Gaming Compact in good faith. There in an answer filed, in that action by the State, maintained that under New York State Law, "as a matter of sound public policy," the Governor must have legislative authorization in order to conclude a Tribal/State Compact. (Exhibit J at paragraph 4 of Goldberg's Affidavit).

This Court does not find that the Indian Gaming Regulatory Act ("IGRA") nor the level of permitted legal gambling activity in New York has in any way amended New York Law. The 1993 Tribal State Compact denied the type

of fundamental and critical policy decision of this State which is solely within the exclusive prerogative of the Legislature. (*Bourquin v. Cuomo*, 85 NY2d 781, 784).

This Court does find that the Governor has no explicit or implicit authority to bind the State to a Tribal State Gaming Compact without specific legislative approval. Therefore, the next issue is whether the compact and its amendments have been adopted by the Legislature. Defendants claim that legislative adoption is demonstrated by the failure to pass bills requiring legislative concurrence for the State to enter a gaming compact; legislative appropriations for the regulations of gaming; and the enactment of Chapter 264 of the laws of 1993, which gives the New York State Racing and Wagering Board employees access to the criminal history records of perspective casino employees. This Court finds that those actions either singularly or combined do not establish legislative ratification of the compact.

Courts are reluctant to give any weight to legislative inaction (*see*, *Matter of Boreali v. Axelrod*, 71 NY2d 1, 13 (1987). It would seem particularly imprudent in this case to give weight to inaction when in fact the Assembly had passed a resolution in 1996 calling for the need for legislative ratification of the gaming compact. (*See*, New York State Assembly Resolution No. 2413, July 12, 1996 [Exhibit E of Motion Action No. 2]). Nor does the Court interpret Chapter 264 of the Law of 1993 as a ratification of the compact as that statute is prefaced by: "In the event it is established that activity under Public Law 100-497 (IGRA) shall be conducted in this State." Obviously, that language indicates the Legislature's withholding of authority until

legislative approval of a valid compact, as a pre-condition of its validity.

Lastly, the defendants argue that various appropriation bills imply legislative ratification. As stated in *Matter of National Resources Defense Counsel v. New York City Dept. of Sanitation*, 83 NY2d 215 (1994):

> "It is well settled that "[repeal or modification of legislation by implication is not favored in the law" (*Matter of Consolidated Edison Co. v. Department of Envtl. Conservation,* 71 NY2d 186, 195), and that the doctrine will "be resorted only in the clearest of cases" (*Ball v. State of New York,* 41 NY2d 617, 622; *see also,* McGivney's Cons. Laws of NY, Book 1, Statutes § 391)."

The facts here do not establish any similar clear implication and this Court will not abrogate the New York Constitution on the basis of those appropriations.

Therefore, the 1993 Tribal-State Gaming Compact and its May 27, 1999 amendment is declared and found to be void and unenforceable as is any Tribal-State Gaming Compact absent Legislative concurrence. The defendants are permanently enjoined from taking any further actions to implement them, including the expenditure of State funds to expand the operation to include the use of electronic gaming compacts with any Indian Tribe without prior legislative concurrence or approval.

Appendix C

All papers, including this Decision and Order, are being returned to the attorneys for the plaintiffs in Action No. 1. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing; entry and notice of entry.

SO ORDERED!

Dated: April 10, 2001
Albany, New York

s/ Joseph C. Teresi
JOSEPH C. TERESI

APPENDIX D — OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT DATED AUGUST 24, 2000

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, NEW YORK

August 24, 2000

(Action No. 1.)

SARATOGA COUNTY CHAMBER OF COMMERCE INC. et al.,

Appellants,

v

GEORGE PATAKI, as Governor of the State of New York, et al.,

Respondents, et al., Defendant.

(Action No. 2.)

KEITH L. WRIGHT, as Member of the New York State Assembly, et al.,

Appellants,

v

GEORGE E. PATAKI, as Governor of the State of New York, et al.,

Respondents, et al., Defendant.

Appendix D

OPINION OF THE COURT

MERCURE, J.

I.

The Indian Gaming Regulatory Act (25 USC § 2701 *et seq.*) (hereinafter IGRA) was enacted in 1988 for the declared purpose of "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" (25 USC § 2702[1]), while at the same time "provid[ing] a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players" (25 USC § 2702[2]). Under IGRA, gaming is divided into three categories. Class III gaming, which is at issue here, is statutorily defined as "all forms of gaming that are not class I gaming or class II gaming" (25 USC § 2703[8]) and includes pari-mutuel horse race wagering, lotteries, banking card games such as baccarat, chemin de fer and blackjack, and electronic or electro-mechanical facsimiles of any game of chance or slot machines of any kind (25 USC § 2703[7][B]; *see*, *Hotel Empls. & Rest. Empls. Intl. Union v. Davis*, 21 Cal 4th 585, 596, 981 P2d 990, 999).

Class III gaming activities are permitted on Indian lands only if "located in a State that permits such gaming for any purpose by any person, organization, or entity, and * * *

conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" (25 USC § 2710[d][1][B], [C]; *see, Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F3d 1250, 1256, *cert. denied sub nom. Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118). The term "Indian lands" encompasses not only lands within the limits of an Indian reservation but also those held in trust by the United States for the benefit of an Indian tribe (25 USC § 2703[4][A], [B]), including lands acquired in trust by the Secretary of the Interior after October 17, 1988 upon a determination "that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination" (25 USC § 2719[b][1][A]).

In 1993, then-Governor Mario Cuomo entered into a Tribal-State compact with the St. Regis Mohawk Tribe (hereinafter the Tribe) which allowed the Tribe to operate gambling casinos. The Tribe opened the Akwesasne Mohawk Casino on its reservation near Hogansburg in Franklin County on April 10, 1999. On May 27, 1999, defendant Governor George Pataki and the Tribe entered into an amendment to the compact to permit the operation of electronic gaming devices, and the Tribe began the operation of these devices the following day. In addition, on October 29, 1999, the Tribe sought review by the Department of the Interior of the Tribe's application to acquire the property of the former Monticello Raceway in the Village of Monticello, Sullivan County, for the purpose of establishing a class III gaming establishment

there. Following such review, the Secretary of the Interior determined that a gaming establishment on the parcel would be in the best interest of the Tribe and its members and would not be detrimental to the surrounding community. The application now awaits action of the Governor pursuant to 25 USC § 2719(b)(1)(A).

On September 23, 1999, plaintiffs in action No. 1 (hereinafter the Saratoga plaintiffs) commenced an action in Supreme Court, Albany County, against the Governor, the State Racing and Wagering Board, and defendant Judith Hard, a former Counsel to the Governor who signed the May 27, 1999 amendment on behalf of the State. The amended complaint alleges that the Governor lacked authority to execute the compact or the amendment and that the types of gambling contemplated by both of them are prohibited by the New York Constitution, criminal statutes and public policy as enunciated by the Legislature. Plaintiffs therefore seek to nullify the compact and the amendment and to enjoin defendants from further implementing either document, including the expansion of the gambling activity onto other sites. The next day, plaintiffs in action No. 2 (hereinafter the Wright plaintiffs) commenced an action in Supreme Court, New York County, against the Governor and the State seeking similar declaratory and injunctive relief. Defendant Village of Monticello moved in action No. 1 to intervene as a defendant and to consolidate the two actions. On November 18, 1999, Supreme Court granted Monticello's motion to intervene and consolidated the actions, with venue in Albany County.

Appendix D

Defendants[1] moved to dismiss both actions upon the grounds that plaintiffs failed to join an indispensable party, i.e., the Tribe, plaintiffs or certain of them lacked standing or legal capacity to sue, the complaints state a claim for relief which is subject to complete Federal preemption, the complaints are barred by the four-month Statute of Limitations of CPLR 217 and by the doctrine of laches, and certain of plaintiffs' claims are not ripe for judicial review. Monticello asserted a counterclaim against the Wright plaintiffs seeking a declaration that the compact and amendment are valid and enforceable. The Wright plaintiffs moved to dismiss the counterclaim. Monticello cross-moved for summary judgment on its counterclaim. Supreme Court granted defendants' motion to dismiss based upon the failure to join the Tribe, which it concluded was an indispensable party. It did not address any of the other grounds asserted for dismissal or Monticello's cross motion for judgment on its counterclaim. Plaintiffs in both actions appeal.

II.

We are faced with the question of whether the Tribe's sovereign immunity from suit can be invoked by a non-Indian party to foreclose judicial review of the authority of the Governor, acting without legislative approval, to enter into a compact with the Tribe. We conclude that Supreme Court abused its discretion in dismissing the actions based on plaintiffs' inability to join the Tribe as a defendant. The general rule is that "[p]ersons who ought to be parties

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1. "Defendants" shall refer to all defendants in both actions, except Monticello.

if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (CPLR 1001[a]). A different rule applies, however, in cases such as this one[2] where jurisdiction cannot be obtained over the nonjoined party without the consent of that party. In such a case, the court may allow the action to proceed in the absence of a necessary party if justice so requires, based on a consideration of (1) whether the plaintiffs have another effective remedy if the action is dismissed for nonjoinder, (2) prejudice to the defendants or the person not joined, (3) whether and by whom prejudice might have been avoided, (4) feasibility of protective orders by the court, and (5) whether an effective judgment may be rendered in the absence of the person not joined (*see*, CPLR 1001[b]). In our view, a balanced consideration of these factors militates against the invocation of the harsh and rarely used remedy of dismissing the complaint for nonjoinder of an indispensable party (*see*, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3211:34, at 47-48).

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2. It is undisputed that plaintiffs cannot obtain jurisdiction over the Tribe because, as a sovereign Indian nation, it is entitled to immunity from suit in State court (*see, Matter of Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 NY2d 553, 558) as well as in Federal court (*see, Oklahoma Tax Commn. v. Potawatomi Indian Tribe*, 498 US 505, 509; *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 862 F Supp 995, 1004, *affd* 94 F3d 747).

First, there is no question that plaintiffs have no other effective remedy if the action is dismissed for nonjoinder. As already noted, the Tribe is immune from suit in both State and Federal courts. In addition, the State is immune from suit in Federal court pursuant to the 11th Amendment of the U.S. Constitution (*see*, *Seminole Tribe v. Florida*, 517 US 44; *Ahern v. State of New York*, 244 AD2d 7, 9). Therefore, dismissal of the action based upon plaintiffs' inability to obtain jurisdiction over the Tribe would have the effect of absolutely barring resolution of the important and far-reaching issues raised in the complaints.

It is noteworthy, we believe, that a number of other jurisdictions have considered the question of whether a governor has the authority to bind a State to an Indian gaming compact, and in every State whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence (*see*, *Jicarilla Apache Tribe v. Kelly*, 129 F3d 535, 537; *Kickapoo Tribe of Indians v. Babbitt*, 827 F Supp 37, 46, *revd on other grounds* 43 F3d 1491; *McCartney v. Attorney General*, 231 Mich App 722, 727-728, 587 NW2d 824, 827, *lv denied* 460 Mich 873, 601 NW2d 101; *Narragansett Indian Tribe v. State*, 667 A2d 280, 282 [RI]; *State ex rel. Clark v. Johnson*, 120 NM 562, 574, 904 P2d 11, 23; *State ex rel. Stephan v. Finney*, 251 Kan. 559, 582-583, 836 P2d 1169, 1185). Further, the Court of Appeals has stated that the fundamental and critical policy decisions of this State are the exclusive prerogative of the Legislature (*see*, *e.g.*, *Bourquin v. Cuomo*, 85 NY2d 781, 784; *Matter of New York State Health Facilities Assn. v. Axelrod*, 77 NY2d 340, 349).

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We are also mindful of defendants' arguments that (1) several bills have been introduced in the State Legislature that would have explicitly prevented the Governor from entering into gaming compacts negotiated pursuant to IGRA and that none have become law, and (2) chapter 264 of the Laws of 1993—authorizing the State Police access to criminal history records of persons applying to engage in activities authorized by IGRA—demonstrates that the Legislature has adopted the compact entered into by the Governor. Given the various arguments and in view of the considerable uncertainty concerning the Governor's authority to bind the State to tribal gaming compacts and the types of gaming that may be legally authorized in New York, the public interest would be best served by a determination of this litigation on the merits.

Nor are we persuaded that great prejudice would result from nonjoinder or that an effective judgment cannot be rendered in the Tribe's absence. Defendants' predictions of dire and irreparable economic injury to the Tribe in the event that judgment is granted in favor of plaintiffs fails to take account of the relief that is actually sought by plaintiffs or the fact that invalidation of the compact and the amendment would result not from the nonjoinder of the Tribe but from the Governor's lack of authority to bind the State—a possibility that was well known and considered at the time the Tribe entered into its agreements with the Governor. The complaint in action No. 1 merely seeks a declaration that the compact and the amendment are illegal and a nullity and permanently enjoining defendants from taking any *further* actions to implement them, i.e., operation of electronic gaming devices pursuant to the amendment or

expansion of the casino operations to the Monticello Raceway property. The complaint in action No. 2 seeks the same relief and, in addition, an injunction against the expenditure of further funds or other effectuation of the amendment or defendants "entering into" or amending any Tribal gaming compacts or the expenditure of funds in connection therewith without the prior full participation of the Legislature. Except for the electronic lottery terminals, which were authorized by the amendment only months prior to the commencement of these actions, the complaints do not seek to interfere with any of the Tribe's existing gaming facilities or activities. Unlike the cases cited by defendants as support for their contention that the Tribe is an indispensable party (*see, e.g., Manybeads v. United States*, 209 F3d 1164; *Fluent v. Salamanca Indian Lease Auth.*, 928 F2d 542, *cert denied* 502 US 818), the present actions do not involve a challenge to the power of an Indian nation. Quite the contrary, the central issue raised by the complaints in these cases is the authority of the Governor to enter into a Tribal State compact without legislative concurrence.

Further, in the event that the present actions were to result in a declaration of the invalidity of the compact and amendment and such declaration were to serve as a predicate for a future action threatening more concrete injury to the Tribe, perhaps a more compelling case for dismissal based on nonjoinder could be made in such action. The mere possibility of such further action provides an insufficient basis for dismissal in this action, however. For similar reasons, we also reject defendant's contention that no effective judgment can be rendered in the absence of the Tribe. Contrary to defendants' assertion, plaintiffs do not seek

to enjoin the Tribe from conducting gambling at its casino. With the exception of the Wright plaintiffs' attack on the amendment, all affirmative relief demanded by plaintiffs is prospective only.

We are also unpersuaded that the Tribe's interests are not being adequately represented by defendants. A person might not be an indispensable party if the absent person is united in interest with a party such that they " stand or fall together" (*Matter of Mount Pleasant Cottage School Union Free School Dist. v. Sobol*, 163 AD2d 715, 716, *affd* 78 NY2d 935; *see*, *Matter of Storrs v. Holcomb*, 245 AD2d 943, 945). Even accepting defendants' speculation that the damage suffered by the Tribe in the event of a judgment in favor of plaintiffs will be different in kind and extent than that suffered by defendants, the fact remains that the defense pursued by defendants is identical to the one that would be undertaken by the Tribe if it were a party to the action. Notably, the outcome of both actions turns on the resolution of pure legal issues involving the construction of State and Federal statutes and constitutions. No suggestion is made that the Tribe's lawyers would be likely to make a more persuasive argument on these issues than the ones that will be made by defendants if the actions are permitted to continue.

Based upon the foregoing, we conclude that the Tribe is not an indispensable party and that the actions may proceed in its absence. Rather than remit the matter to Supreme Court for consideration of the additional issues raised on the motions, we will endeavor to expedite a determination of the actions on the merits by resolving them ourselves.

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III.

A plaintiff has standing to maintain an action when that plaintiff has suffered an injury in fact and such injury falls within the zone of interests to be protected by the statute or constitutional provision involved (*see*, *Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 772-773). Here, plaintiffs argue that they have standing as voters and as citizen-taxpayers under State Finance Law § 123-b, organizational standing on behalf of members who either are opposed to gambling, favor constitutional action or, in the case of the Saratoga County Chamber of Commerce, would allegedly be hurt by the diversion of gamblers from Saratoga to the tribal casinos, and as individual members of the Legislature who were denied the right to vote on the approval of the compact. For the reasons that follow, it is our view that plaintiffs in both actions have standing.

First, we agree with plaintiffs that they have standing under State Finance Law § 123-b, which provides standing for citizen taxpayers in a suit concerning the wrongful misappropriation, expenditure or illegal disbursement of State funds (*see*, State Finance Law § 123-b[1]). " Since most activities can be viewed as having some relationship to expenditures * * * too broad a reading of section 123-b would create standing for any citizen who had the desire to challenge virtually all governmental acts" (*Rudder v. Pataki*, 93 NY2d 273, 281), and governmental acts which only incidentally involve State finances cannot be challenged based on State Finance Law § 123-b (*see*, *id.*, at 280-281; *Matter of Transactive Corp. v. New York State Dept. of Social Servs.*, 92 NY2d 579, 588-589; *Public Util. Law Project v. New York*

State Pub. Serv. Commn., 252 AD2d 55, 58-59; *Matter of Gerdts v. State of New York*, 210 AD2d 645, 647-648, *lv denied* 85 NY2d 810, *appeal dismissed* 85 NY2d 856). Here, however, we conclude that plaintiffs' challenge to the expenditure of moneys to implement a casino-gambling compact that was not approved by the Legislature, including the expenditure of funds to pay State Police personnel providing security and State Racing and Wagering Board employees regulating the casinos on a 24-hour basis, has "a sufficient nexus to fiscal activities of the State to allow for section 123-b standing" to the citizen-taxpayer plaintiffs in both actions (*Rudder v. Pataki*, *supra*, at 281; *see*, *Matter of Schulz v. Silver*, 212 AD2d 293, 296, *appeal dismissed* 86 NY2d 835, *lv dismissed and denied* 87 NY2d 916; *compare*, *Matter of Gerdts v. State of New York*, *supra*).

Next, we address defendants' argument that the plaintiff organizations lack standing. Organizational standing requirements are intended to "ensure that the requisite injury is established and that the organization is the proper party to seek redress for that injury" (*Society of Plastics Indus. v. County of Suffolk*, *supra*, at 775). An organization seeking standing must establish that (1) one or more of its members has been harmed, (2) the interests it asserts are germane to its purposes so as to demonstrate that it is an appropriate representative of those interests, and (3) the case would not require the participation of individual members (*see*, *Rudder v. Pataki*, *supra*, at 278).

New Yorkers for Constitutional Freedoms is a not-for-profit corporation representing approximately 1,650 churches and groups throughout the State whose individual members

are opposed to casino gambling and support the constitutional operation of government. The Coalition Against Casino Gambling is a not-for-profit association whose individual members reside primarily in the Catskills and are opposed to casino gambling in that region. Similarly, the Western New York Coalition Against Casino Gambling is an unincorporated association representing religious organizations and grassroots citizens who oppose casino gambling in this State. The interests asserted by the foregoing organizations are germane to their purposes and their individual members claim to have suffered directly from constitutional violations. Contrary to defendants' arguments that the organizations' allegations are nothing more than "generalized grievances unsuited to judicial review", it is our view that they have alleged cognizable harm to their members and that the requirements for standing have been met (*see*, *Subcontractors Trade Assn. v. Koch*, 62 NY2d 422, 426; *National Org. for Women v. State Div. of Human Rights*, 34 NY2d 416, 419-420; *cf.*, *Rudder v. Pataki*, *supra*, at 279).

We agree with defendants, however, that the Saratoga County Chamber of Commerce does not have standing. That organization asserts that it represents over 2,300 businesses and professional organizations whose economic livelihood depends on pari-mutuel bettors at the racetrack, which bettors may be lured away by the Tribe's existing casino and the casino planned for Monticello. In our view, the harm claimed is too speculative and attenuated to constitute an injury in fact (*see*, *Rudder v. Pataki*, *supra*, at 280). In any event, the constitutional provisions relied upon, relating to separation of powers and gambling, were certainly not intended for the protection of competing gambling facilities (*see*, *Matter of*

Troy Ambulance Serv. v. New York State Dept. of Health, 260 AD2d 715, 716; *Matter of LaSalle Ambulance v. New York State Dept. of Health*, 245 AD2d 724, *lv denied* 91 NY2d 810).

There is also no merit to the Saratoga plaintiffs' contention that they have voter standing because, as voters, they are entitled to the protection of the State's constitutional provisions regarding gambling, which can only be changed by a referendum approved by the State's voters. Voter standing arises when the right to vote is eliminated or votes are diluted (*see*, *Rudder v. Pataki*, *supra*, at 281; *see also*, *Schulz v. State of New York*, 84 NY2d 231, 240-241, *cert denied* 513 US 1127). In the present case, none of the constitutional or statutory provisions invoked by plaintiffs regarding separation of powers or gambling implicate the right to vote.

Finally, plaintiffs Frank Padavan and William Parment and the Wright plaintiffs seek standing as legislators but have not shown a particularized injury or established the absence of adequate political remedies. Indeed, their claim of standing is based on a loss of political power rather than the assertion that they have been deprived of something to which they personally are entitled (*cf.*, *Powell v. McCormack*, 395 US 486, 496). Unlike the cases relied upon by plaintiffs where standing was found because the defendants' actions affected legislators' statutory rights or duties (*see*, *Winner v. Cuomo*, 176 AD2d 60 [Members of the State Assembly claimed that Governor's failure to submit timely budget bills reduced their time to consider the bills]; *Matter of Sullivan v. Siebert*, 70 AD2d 975 [as a member of the Legislature, the plaintiff

was entitled to receive a copy of the defendant's report]), here, none of defendants' actions precluded the Legislature from acting and the claim that defendants acted improperly does not differentiate the legislative plaintiffs from the general public (*see*, *Raines v. Byrd*, 521 US 811; *Chenoweth v. Clinton*, 181 F3d 112, 115-116, *cert denied* 529 US 1012; *Matter of Posner v. Rockefeller*, 26 NY2d 970; *Silver v. Pataki*, 274 AD2d 57). While these plaintiffs do not have standing as legislators, they do have standing under the State Finance Law.

IV.

We also reject the contention that the actions are preempted by Federal law. Although it cannot be denied that IGRA is a Federal statute and that the regulation of Indian affairs is generally a Federal matter, we conclude that the narrow issues raised in these complaints are not preempted by Federal law. "IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact" (*Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1557, *cert denied* 522 US 807 [citation omitted]; *see*, *Gaming Corp. v. Dorsey & Whitney*, 88 F3d 536, 544 [while IGRA generally preempts State law, the Tribal State compact provides the only avenue for significant State involvement]). Additionally, the Federal Department of the Interior opined that a governor's authority to enter into a Tribal-State compact is a matter of State law. Fundamentally, the interpretation given to a statute by the agency charged with enforcing it is entitled to great deference (*see*, *Chevron, U.S.A. v. Natural Resources Defense Council*,

467 US 837, 844; *Matter of Brown v. Wing*, 93 NY2d 517, 524; *Matter of Goff v. New York State Dept. of Social Servs.*, 222 AD2d 83, 87).

Nor are we persuaded that the actions are barred by the Statute of Limitations or laches. The four-month limitations period of CPLR 217, which is pressed by defendants, would apply only if the actions could have been brought as a CPLR article 78 proceeding (*see*, *New York City Health & Hosps. Corp. v. McBarnette*, 84 NY2d 194, 201-202). Here, the substance of the complaints is that the State's chief executive officer acted or threatens to act in violation of law or in excess of the powers conferred upon him by the State Constitution. In our view, neither of the actions could have been brought as a CPLR article 78 proceeding and the four-month Statute of Limitations of CPLR 217 accordingly does not apply (*see*, *Matter of Hamptons Hosp. & Med. Ctr. v. Moore*, 52 NY2d 88, 96; *Matter of McGinley v. Hynes*, 51 NY2d 116, 124, *cert denied* 450 US 918; *cf.*, *New York City Health & Hosps. Corp. v. McBarnette*, *supra*, at 204). As for laches, it should suffice to note that no party to the action has been prejudiced by plaintiffs' delay in bringing its challenge to the 1993 compact (*see*, *Matter of Schulz v. State of New York*, 81 NY2d 336, 348). Obviously, were the Tribe to voluntarily join as a party it could raise laches as a defense, with some likelihood of success (*see*, *Matter of Stockdale v. Hughes*, 189 AD2d 1065, 1067).

Finally, we agree with defendants that so much of the claims as seeks to restrain the development of a gambling casino at the Monticello site is not ripe for review. "Where the harm sought to be enjoined is contingent upon events

which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract" (*Matter of New York State Inspection, Sec. & Law Enforcement Empls. v. Cuomo*, 64 NY2d 233, 240 [citation omitted]; *see, New York Pub. Interest Research Group v. Carey*, 42 NY2d 527, 531). "However, where the practical likelihood is that the future contingency will occur, the action may proceed" (*Prodell v. State of New York*, 211 AD2d 966, 967-968 [citations omitted]). In this case, although the Secretary of the Interior has during the pendency of the action approved the land trust agreement, the Governor has neither taken action nor given any indication that he intends to take action on it.

To summarize, we have determined the following: (1) the Tribe is not an indispensable party and the actions may proceed in its absence; (2) plaintiffs have standing under State Finance Law § 123-b (1), three of the plaintiff organizations have standing and both actions may therefore proceed; plaintiffs have neither voter standing nor standing as legislators, however; (3) the narrow issues raised in these complaints are not preempted by Federal law; (4) the actions are not barred by either the Statute of Limitations or laches; (5) that part of the claims as seeks to restrain the development of a gambling casino at the Monticello site is not ripe for review.

In view of the foregoing, we conclude that Supreme Court should have denied all of the parties' motions except so much of defendants' motions as sought to dismiss the branch of the complaints addressed to the proposed Monticello casino and the part of defendants' motion

dismissing the complaint by Saratoga County Chamber of Commerce for lack of standing.

CARDONA, P. J., CREW III, SPAIN and LAHTINEN, JJ., concur.

Ordered that the judgment is reversed, on the law, without costs, defendants' motions to dismiss denied except to the extent that so much of the complaints as seeks to enjoin the establishment of a gambling casino in the Village of Monticello, Sullivan County, is dismissed as premature, and motions granted as to plaintiff Saratoga County Chamber of Commerce; and matter remitted to the Supreme Court for further proceedings not inconsistent with this court's decision.

APPENDIX E — DECISION AND ORDER OF THE NEW YORK SUPREME COURT, ALBANY COUNTY DATED MARCH 8, 2000

STATE OF NEW YORK
COUNTY OF ALBANY
SUPREME COURT

INDEX NO. 5507-99

ACTION NO. 1

THE SARATOGA COUNTY CHAMBER OF COMMERCE, INC., JOSEPH DALTON; NEW YORKERS FOR A CONSTITUTIONAL FREEDOMS, LTD.; LEE KARR, individually and as Chairman of THE COALITION AGAINST CASINO GAMBLING, an Unincorporated Association; G. STANFORD BRATTON, Individually and as Coalition Coordinator for the WESTERN NEW YORK COALITION AGAINST CASINO GAMBLING, an Unincorporated Association; the HONORABLE FRANK PADAVAN, Duly Elected and Serving Member of the New York State Senate; and the HON. WILLIAM PARMENT, a Duly Elected Member of the New York State Assembly,

Plaintiffs

-against-

HON. GEORGE PATAKI, Governor of the State of New York, JUDITH HARD, Deputy Counsel to the Governor, and the NEW YORK STATE RACING AND WAGERING BOARD,

Defendants.

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INDEX NO. 11971-99

ACTION NO. 2

KEITH L. WRIGHT, as Member of the New York State Assembly, and LARRY B. SEABROOK, as member of the New York State Senate,

Plaintiffs,

-against-

GEORGE E. PATAKI, as Governor of the State of New York, and THE STATE OF NEW YORK,

Defendants.

Supreme Court All Purpose Term, February 1, 2000
Assigned to Justice Joseph C. Teresi

* * *

DECISION AND ORDER
RJI NO. 0199059775

TERESI, J.:

Defendants move separately to dismiss both above-captioned actions, number one and two. Third-party plaintiff, Village of Monticello, cross-moves for an order pursuant to CPLR 3212 granting summary judgment on its' claim for an Order declaring the 1993 Compact and May 27,

1997 Amendment valid and enforceable. Plaintiff opposes defendant's motions and third-party defendants oppose the cross-motion.

In October 1993, then-New York Governor Mario Cuomo signed a compact with the St. Regis Mohawk Indian Tribe, which was subsequently approved by the United States Secretary of the Interior, entitled the "Tribal Compact between the St. Regis Mohawk Tribe and the State of New York." The Compact authorizes the St. Regis Mohawk Indian Tribe to conduct certain commercial Class III gaming operations within the Mohawk Tribe's reservation, located on the their Akwesasne reservation in northern New York.

The Compact was entered into pursuant to the provisions of the federal Indian Gaming Regulatory Act (IGRA). The IGRA provides a regulatory framework for gaming activities on Indian lands. The IGRA provides that Class III gaming, which concerns the St. Regis Mohawk Tribe's conduct in this lawsuit, is only lawful when it is: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and approved by the Chairman of the National Indian Gaming Commission; (2) located in State that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State that is in effect. 25 U.S.C. § 2710(d)(1).

Pursuant to the 1993 Compact, the St. Regis Mohawk Indian Tribe opened a casino on their reservation in Franklin County in April 1999. On May 27, 1999, Governor Pataki,

through his Deputy Counsel Judith Hard, entered into an Amendment to the 1993 Compact allowing electronic gaming devices at the Casino.

Furthermore, in August 1996, the St. Regis Mohawk Indian Tribe pursuant to federal law, submitted an application to the US Department of Interior requesting that the Secretary of Interior acquire land into trust in and around Monticello Raceway in Sullivan County so that the Mohawk Tribe could operate a gambling casino. To date, the application is still under consideration by the Secretary of the Interior. If approved by the Secretary, the application will then require the concurrence of the Governor.

In short, plaintiffs argue that neither Governor Cuomo or Governor Pataki had the authority to enter into the Compact and Amendment without the express authorization of the State Legislature. Therefore, the 1993 Compact and Amendment must be ruled invalid and unenforceable. Additionally, plaintiffs aver that the types of gaming involved in the Compact and Amendment is prohibited by the New York State Constitution. Initially, defendants answer by asserting that the lawsuit should be dismissed based on a number of procedural deficiencies which include, *inter alia*, failure to name an indispensable parry.

A court may always consider whether there has been a failure to join a necessary party. *See City of New York v. Long-Island Airports Limousine Service Corp.*, 48 NY2d 469, 475 (1980). Necessary parties are defined as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who

might be inequitably affected by a judgment in the action." (CPLR § 1001(a)). An action is subject to dismissal if there has been a failure to join a necessary party. (*See* § CPLR 1003(b)). The rule insures fairness to third parties who ought not to be prejudiced or embarrassed by judgment purporting to bind their rights or interest where they have had no opportunity to be heard. *See City of New York, supra.*

Furthermore, a determination as to whether parties are so "indispensable" that in their absence a matter should not proceed is limited to those cases where the determination will adversely affect the rights of non-parties. *Matter of Vicki Llana v. Town of Pittstown,* 245 AD2d 968 (3rd Dept. 1997); *Matter of Castaway Motel v. Schuyler,* 24 NY2d 120, 125 (1969).

Based upon a full review of the record, this court holds the St. Regis Mohawk Indian Tribe to be an indispensable party to these actions. Therefore, the court grants defendant's motion to dismiss the complaint. Consequently, the Court finds no reason to address plaintiff's remaining contentions, nor address third party plaintiff's motion for summary judgment.

Initially, this court recognizes New York courts have held that an Indian tribe may be found an indispensable party to a lawsuit. *See Niagra Mohawk Power Corp. v. Anderson,* 258 AD2d 958 (4th Dept. 1999); *Anderson v. Town of Lewiston,* 244 AD2d 965 (4th Dept. 1997). Furthermore, there can be little doubt here, that a ruling invalidating the 1993 Compact and Amendment would adversely affect the St. Regis Mohawk Indian Tribe. *See Llana., supra* at 969.

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In holding the Mohawk Tribe to be indispensable party to this lawsuit, the court finds the criteria in CPLR § 1001(b)(2) to be the most compelling factor in weighing the merits of this issue. CPLR § 1001(b)(2) states a "court shall consider the prejudice which may accrue from the non-joinder to the defendant or to the person not joined." By carefully balancing the potential prejudices that would accrue, respectively, to the St. Regis Mohawk Indian Tribe and plaintiffs, this court finds that the potential prejudice to the Mohawk Tribe outweighs the prejudice to plaintiffs. Furthermore, any litigation commenced in the Mohawk Tribe's absence might "inequitably affect" their interests. (*See Niagra Mohawk Com. v. Anderson,* 258 AD2d 958, 959 (4th Dept. 1999); *See Anderson v. Town of Lewiston,* 244 AD2d 965, 966 (4th Dept. 1997).

The 1993 Compact and Amendment creates the authority by which the St. Regis Mohawk Indian Tribe can conduct Class III gaming operations on its reservation. This type of gaming is considered the most lucrative form of gambling, and therefore, is an important source of revenue for the Mohawk Tribe. An invalidation of the Compact would strip the Mohawk Tribe of this valuable right granted to them by the Compact in allowing the them to conduct certain gaming operations on their reservation. Consequently, without an agreement, the Mohawk Tribe stands to lose millions in revenue.

Moreover, should the St. Regis Mohawk Indian Tribe continue to conduct class III gaming operations without a valid compact, they could face serious federal penalties by violating the IGRA, subjecting them to civil or criminal

consequences in federal court. (*See United States v. Santee Sioux Tribe of Nebraska,* 135 F.3d 558 (8th Cir. 1997); *See Pueblo of Santa Ana v. Kelly,* 932 F. Supp. 1284 (D.N.M. 1996), *aff d.* 104 F.3d 1546 (10th Cir. 1997).

In conclusion, this court agrees with defendants that the failure to join the St. Regis Mohawk Indian Tribe, an indispensable party, requires the dismissal of the above-captioned actions, number one and two. "Because resolution of these controversies involve a determination of the rights and powers of the Indian Nation to [allow certain commercial gaming operations] on its reservation, complete relief cannot be accorded without the Indian Nation as a party. Furthermore, because a judgment in plaintiffs favor would challenge the [rights] of the Indian Nation, the Indian Nation might be 'inequitably affected' by this litigation.'" *See Niagra Mohawk Power Corp. v. Anderson,* 258 AD2d 958, 959 (4th Dept. 1999); *Anderson v. Town of Lewiston,* 244 AD2d 965, 966 (4th Dept. 1997).

All papers, including this Decision and Order, are being returned to the attorneys for the defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: Albany, New York
March 8, 2000

s/ Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

APPENDIX F — LETTER FROM THE SUPREME COURT OF THE UNITED STATES, OFFICE OF THE CLERK, WASHINGTON DC TO ANDREW D. BING DATED JULY 29, 2003

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 29, 2003

Mr. Andrew D. Bing
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, NY 12224

Re: George Pataki, Governor of New York, et al.
v. Saratoga County Chamber of Commerce, Inc., et al.
Application No. 03A75

Dear Mr. Bing:

The above-entitled application was presented to Justice Ginsburg, who on July 29, 2003, noted thereon the following:

> "The Appellate Division, whose order the Court of Appeals affirmed in relevant part, noted that 'plaintiffs do not seek to shut down the Tribe's casino located on the Akwesane reservation

> insofar as it is operated in accordance with the original compact.' 293 A. D. 2d 20, 22 (N.Y. App. Div. 2002). The application for a stay is denied on the understanding that 'operat[ing] in accordance with the original compact' includes continued gaming oversight by the New York State Racing and Wagering Board and continued law enforcement by the New York State Police."

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by s/ Troy D. Cahill

Troy D. Cahill
Staff Attorney

Supreme Court, U.S.
FILED
OCT 14 2003
OFFICE OF THE CLERK

No. 03-392

IN THE

Supreme Court of the United States

GEORGE PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

-v-

THE SARATOGA COUNTY CHAMBER OF COMMERCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION

CORNELIUS D. MURRAY*
O'CONNELL AND ARONOWITZ
Attorneys for Respondents Saratoga County Chamber of Commerce, Inc.; Joseph Dalton; New Yorkers for Constitutional Freedoms, Ltd.; Lee Karr; Individually and as Chairman of The Coalition Against Casino Gambling; G. Stanford Bratton, Individually and as Coalition Coordinator for the Western New York Coalition Against Casino Gambling; the Hon. Frank Padavan; and the Hon. William Parment
54 State Street
Albany, N.Y. 12207-2501
(518) 462-5601

* Counsel of Record

Dated: October 9, 2003

(1041 – 2003)

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether an action commenced in state court by a citizen of that state seeking prospective declaratory and injunctive relief against its Governor with respect to his power under that state's Constitution to unilaterally enter into a compact with Native American tribes pursuant to the Federal Indian Gaming Regulatory Act must be dismissed because such tribes' sovereign immunity prevents their joinder as parties to the litigation?

STATEMENT PURSUANT TO RULE 29.6

This brief in opposition is submitted on behalf of the plaintiffs in Action No. 1, whose names are listed on the cover. This action was consolidated with a very similar action (Action No. 2) that had been initiated by a separate group of plaintiffs. *See* Record on Appeal, at A. With respect to the corporate plaintiffs in Action No. 1, both the Saratoga County Chamber of Commerce, Inc., and New Yorkers for Constitutional Freedoms, Ltd., are not-for-profit corporations with no corporate parents, and neither has issued any stock that is owned by any publicly-held company.

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RESPONDENTS' BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I.
The Decision by the New York State Court of Appeals Does Not Implicate Any Vested Tribal Rights Nor Compromise Tribal Sovereignty.

In the decision below, the New York State Court of Appeals ruled that the Governor of that State had violated New York's constitutional separation of powers by unilaterally entering into a compact with the St. Regis Mohawk Indian Tribe without legislative authorization, thereby permitting that Tribe to operate a commercial gambling casino that otherwise would have been prohibited under the Federal Indian Gaming Regulatory Act. 25 U.S.C. § 2710(d)(1)(C). *See* Petition for Writ of Certiorari ("Petition"), at 2a-62a. The Court of Appeals, therefore, upheld the trial court's order enjoining the Governor from entering into any future compacts with *any* Indian tribe absent legislative authorization. *See* Petition at 85a.

The Petition is predicated upon the alleged threat to tribal sovereignty posed by this decision and, in particular, the alleged threat to the continued operation by the St. Regis Mohawks of the gambling casino located at their Akwesasne Reservation in northern New York. *See* Petition at 13 *et seq.* That threat is grossly overstated.

Throughout this litigation, respondents in Action No. 1 have made it abundantly clear that their objective in this case has not been the closure of the existing casino, which petitioners contend would arguably affect vested rights of the St. Regis Mohawks and, indirectly, the Tribe's sovereignty. *See* Record on Appeal at 915. Instead, respondents have consistently sought

to prevent any expansion of gambling pursuant to *future* amendments to the compact with the Tribe which, under the Indian Gaming Regulatory Act ("IGRA"), may not become effective until after they are approved by the U.S. Secretary of the Interior. 25 U.S.C. § 2710(d)(3)(B).

This very point was made in two different decisions by the Appellate Division below, which noted that the plaintiffs in Action No. 1 (respondents here) were seeking "prospective relief only." *See* Petition at 98a-99a; *see also* Petition at 68a-69a. The crucial issue, therefore, in this case, is not whether the St. Regis Mohawk Tribe can continue to operate its casino gambling operation under the terms of the Compact that Governor Cuomo had originally entered into with the Tribe. Rather, it is whether the State's Governor, given the separation of powers provisions of the New York Constitution, has the authority to enter into compacts in the future without legislative authorization. That was the crux of the declaratory and injunctive relief the respondents sought when they commenced this action. Indeed, Justice Ginsburg noted the limited nature of the relief respondents sought when she denied the application for a stay pending the filing of a petition for certiorari. *See* Petition at 112a-113a.

Prospective relief was also the critical component of the order of the state trial court judge which was ultimately affirmed by the Court of Appeals enjoining the Governor from expanding the operation to include "electronic gaming compacts with *any* Indian tribe without prior concurrence or approval." (emphasis supplied). *See* Petition at 85a. To summarize, Respondents have not and did not seek to close the St. Regis Mohawk's existing casino operation. There is, therefore, no threat posed to tribal sovereignty by the decision below, since no vested rights were affected. Moreover, respondents' challenge to the 1999 Amendment to the Compact had expired by the time the case

reached the Court of Appeals, and therefore the Court declared that issue moot. *See* Petition at 6a-8a. Since any rights the Tribe may have had under the Amendment had also expired, no tribal rights were in jeopardy. The only remaining relevant part of the decision below was whether, *before* the current or any future Governor entered into any more compacts with Indian tribes, could he/she take such action absent legislative authorization under New York's constitutional separation of powers. This is not a federal question. *See* Point II, *infra*.

II.
The Decision Below by New York State's Highest Court Does Not Raise a Federal Question.

Petitioners are attempting to manufacture a federal question where none exists. To be sure, IGRA is a federal statute, but its implementation requires extensive participation by State governmental officials in the process. While IGRA generally prohibits Indian tribes from engaging in so-called "Class III" gaming, including the operation of sophisticated Las Vegas-style commercial gambling casinos at issue in this case, it allows for an exception provided, *inter alia*, a tribe enters into a compact with the State where such gambling is to occur. 25 U.S.C. § 2710(d)(1)(C). As this Court has noted, however, the duty to negotiate on behalf of a state is one not "likely to be performed by an individual state executive officer, or even a group of officers." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75, n. 17 (1996). Indeed, Congress, in enacting IGRA, did not presume to tell a state which officials or bodies of the state were to represent the state – nor could it. It is axiomatic that Congress cannot rewrite State Constitutions, or impart to State officials power that they do not possess under their own Constitutions. Congress may not commandeer State officials to

carry out Federal policy. *New York v. United States*, 505 U.S. 144, 176 (1992).

The question of what state officials or bodies can bind a state to a compact under IGRA is, therefore, a quintessential state – rather than federal – law issue that implicates a state's Constitution and its very structure of government. The proposition that state courts are the ultimate arbiters of who, if anyone, can represent a state in compact negotiations with Indian tribes under IGRA is fully accepted by the U.S. Department of Interior, the Federal agency charged with interpreting that statute. *See*, *e.g.*, letter from U.S. Assistant Secretary for Indian Affairs, U.S. Department of the Interior, to Hon. Pete Wilson, Governor of California, dated April 25, 1998. Record on Appeal at 669 (issue concerning the scope of Governor's authority under IGRA is a matter of State law appropriate for ultimate determination by the California judiciary).

Petitioners nevertheless would divest all state courts from ever resolving such a profoundly important constitutional question on the theory that its resolution would necessarily affect the future, contingent interests of Indian tribes that are immune from suit in both state and federal courts and, therefore, cannot be joined as parties. Petitioners further contend that the Tribes are, nevertheless, indispensable parties to any litigation. The inexorable result of such logic is that no court could ever resolve these important state constitutional issues, leaving a judicial vacuum fraught with the potential for mischief and chaos. What if, for example, the next tribe wanting to negotiate a compact with New York under IGRA were to feel frustrated under the Governor and decide instead to enter into a compact with the leaders of the State Legislature, who might be disposed to give the tribe a more favorable "deal"? Then the shoe would be on the proverbial other foot, with the Governor seeking to

challenge the State Legislature's usurpation of his powers. He too, however, would be left without a judicial remedy based upon the very same arguments he has advanced in this litigation.

The doctrine of tribal sovereign immunity was never intended to extend so far that it would deprive a state court of jurisdiction to decide under its own Constitution whether its state officials have the power to enter into compacts with Indian tribes in the future *before* the tribes obtain any vested rights under such Compacts. An Indian tribe's right to gamble is not so essential to its sovereignty that it would prevent a State court from resolving such an important question. It is clear, moreover, that nothing in IGRA requires a State to enter into a Compact with any Indian tribe. *See Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1434 (10th Cir. 1994), *vacated and remanded in another issue*, 517 U.S. 1129 (1996); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993); *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292, 1297 (D. Ariz. 1992); *see also*, *New York v. United States*, 505 U.S. 144 (1992) (Congress cannot force states or state officials to be their instrumentalities to carry out federal policy).

Since respondents do not seek to close the St. Regis Mohawk tribe's existing casino, and since the prospective declaratory and injunctive relief respondents obtained with respect to a Governor's powers to enter into future compacts before any tribes had any vested rights under such Compacts does not implicate tribal sovereignty, there is no federal question posed.

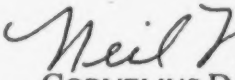
Finally, the New York Court of Appeals applied its State indispensable party jurisprudence pursuant to N.Y. C.P.L.R. 1001(b). Seeking to minimize any conceivable prejudice to the Tribe, it also noted that the St. Regis Mohawks were free to intervene (*see* Petition at 23a), but the Tribe opted not to. The

Court of Appeals ultimately decided that under New York State's indispensable party principles, New York's judiciary should not be deprived of the right to decide a question of profound constitutional significance, implicating its own principles of separations of powers, even though the Tribe was absent from the litigation. Since the prospective relief granted pursuant to its decision does not affect any vested rights of the Tribe, there is no federal question involved. Federal courts do not sit to review a state court's decision on such a fundamentally important question of internal state constitutional law.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition be denied.

Respectfully submitted,



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No. 03-392

IN THE

Supreme Court of the United States

GEORGE PATAKI, Governor of the State of New York, *et al.*,

Petitioners,

v.

THE SARATOGA COUNTY CHAMBER OF COMMERCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF

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ARGUMENT

In their opposition to the petition for certiorari, respondents Saratoga County Chamber of Commerce, Inc., et al. (respondents in action number one, *Saratoga County Chamber of Commerce, Inc., et al. v. George Pataki, et al.*)[1] wrongly assert that the sovereign immunity of the St. Regis Mohawk Tribe was not compromised by the decision of the New York Court of Appeals. Respondents argue that the Court of Appeals' decision affects only future compact approvals, noting that they never sought to close the Tribe's casino. Brief in Opp. at 1-2. Regardless of how they characterize the relief they sought, respondents ignore the Court of Appeals' affirmation of the lower court's declaration that the 1993 tribal-state gaming compact, pursuant to which the Tribe operates its casino, was void and unenforceable (App. A, 62a; App. B, 74a; App. C, 85a).[2] Moreover, the Court of Appeals recognized that "a declaration that the 1993 compact violates the State Constitution" would make the casino operation illegal and also that the Tribe's "interests are certainly affected by this litigation." (App. A, 8a, 19a). Finally, during the argument in the Court of Appeals, respondents in the second action repudiated the Appellate Division's statements that they sought purely prospective relief and asked the Court of Appeals to affirm the declaration that the 1993 compact was void and unenforceable. (USET App. A, 31a-33a, 35a, 41a).[3]

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1. Respondents Wright and Seabrook (respondents in action number two, *Keith L. Wright and Larry B. Seabrook v. George Pataki, et al.*) did not file a brief in opposition to the petition for certiorari. In the interests of simplicity, respondents in action number one will hereinafter be referred to as "respondents."

2. References to "App." are to the appendices to the petition for certiorari.

3. References to the "USET App.", are to the appendices to the brief amicus curiae of the United South and Eastern Tribes, Inc. in support of the petition for certiorari.

Consequently, respondents' contention that the Tribe's sovereign immunity was not compromised because the decision affected only future casino approvals is erroneous.

Respondents' assertion that the decision of the Court of Appeals does not raise a federal question, Brief in Opp. at 3-6, is also incorrect. Before addressing respondents' state constitutional claims, the Court of Appeals rejected petitioners' assertion that the action must be dismissed because the Tribe was an indispensable party whose sovereign immunity precluded its joinder. In concluding that the Tribe could have waived its immunity and joined this action, App. A, 19a-23a, the court disregarded the Tribe's immunity from suit, an immunity that this Court has held to be privileged by federal law "from diminution by the States." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 891 (1986) (holding that a state law conditioning the tribe's access to the state courts as a plaintiff on its blanket waiver of sovereign immunity "is unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws"). As described in detail in the petition for certiorari, the Court's disregard of tribal sovereign immunity below squarely conflicts with the holdings of the Second, Seventh, Ninth, Tenth and District of Columbia Circuits as well as the New Mexico Supreme Court. Petition for Certiorari at 7-13.

Accordingly, we respectfully urge this Court to grant the petition for certiorari to resolve this conflict and to vindicate the important federal interests in tribal self-government and sovereign immunity ignored by the Court of Appeals.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

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GEORGE PATAKI,
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v.

THE SARATOGA COUNTY
CHAMBER OF COMMERCE, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF *AMICUS CURIAE* OF THE UNITED SOUTH AND EASTERN TRIBES, INC., IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF *AMICUS CURIAE*

The United South and Eastern Tribes, Inc. ("USET") is a non-profit inter-tribal organization founded in 1968. USET is dedicated to promoting Indian leadership, improving the quality of life for American Indians, and protecting Indian rights and natural resources on tribal lands. [1] USET includes twenty-four federally recognized tribal governments from an area stretching from Maine to Texas.[2]

USET has an interest in the issues presented in this case. All of its members have federally protected sovereign immunity and will be injured if state courts force them to a choice between asserting their sovereign immunity and protecting their other significant interests. In addition, many of USET's members have entered into tribal-state gaming compacts in effect under IGRA and have invested resources into developing federally approved gaming on tribal lands. The state court's assertion that the validity of such a compact

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1 Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, A*micus Curiae* states that no party authored this brief in whole or in part, and no person or entity, other than A*micus Curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

2 The members of USET are: the Eastern Band of Cherokees, the Mississippi Band of Choctaws, the Miccosukee Tribe, the Seminole Tribe of Florida, the Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the St. Regis Band of Mohawk Indians, the Penobscot Indian Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, the Tunica-Biloxi Indians of Louisiana, the Poarch Band of Creek Indians, the Narragansett Indian Tribe, the Mashantucket Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), the Alabama-Coushatta Tribe of Texas, the Oneida Indian Nation, the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Jena Band of Choctaw Indians, the Mohegan Tribe of Connecticut, and the Cayuga Nation. See 67 Fed. Reg. 46328 (July 12, 2002) (list of federally recognized tribes published pursuant to 25 U.S.C. § 479a-1).

is a matter of state concern, which can be adjudicated without considering either the tribal or federal interests at stake, undermines the comprehensive regulatory scheme established in the Indian Gaming Regulatory Act ("IGRA") and threatens the federal protection of Indian sovereignty over tribal lands.

USET respectfully submits this brief to address the federal protection of Indian sovereignty and the federal and tribal interests that were ignored by the New York Court of Appeals.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

The issue in this case is the supremacy of federal law. The object of this litigation is to interfere with and, indeed, to eliminate Indian casino gaming in New York. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 209-11, 221 (1987), this Court held that a state, such as New York, that permits gaming in some form by non-Indians, has no authority to regulate or limit gaming on Indian land. In the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et. seq.*, (2003) Congress provided that a state must negotiate a tribal-state Compact to allow casino and other Class III gaming activities on Indian lands if the state "permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d) (2003). Here, New York and the Mohawks entered into such a Compact in 1993; it became effective upon approval by the Secretary of the Interior and publication in the federal register.[3] The Court of Appeals held the 1993 Tribal-State Compact ("Compact") invalid, in the absence of both the Mohawks and the United States.

As described by the Court of Appeals, "[p]laintiffs are legislators, organizations and individuals opposed to casino

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[3] Notice of Approved Tribal-State Compact, 58 Fed. Reg. 65272 (1993).

gambling." *Saratoga County Chamber of Commerce, Inc. v. Pataki* (App. A, 2a).[4] Plaintiffs claimed that the Compact authorizing Mohawk gaming under IGRA was invalid, because the governor had no authority to execute a Compact without legislative approval. Plaintiffs sought and obtained a ruling that all parties before the court believed would result in the closure of the casino. *Saratoga County Chamber of Commerce v. Pataki*, New York Court of Appeals, Transcript of Oral Argument, May 6, 2003 ("Oral Arg.Tr.") (USET App. A, 5a, 18a, 43a).[5]

Plaintiffs also sought a ruling that Class III tribal gaming violates the New York Constitution. As framed by the plaintiffs in Action No. 1, the questions presented to the Court of Appeals included: "did the Compact . . . violate Article I, § 9 of the [New York] Constitution prohibiting commercial gambling?" and, "[i]n light of the 10th Amendment to the U.S. Constitution, . . . should . . . [IGRA] be read as overriding New York's constitutional and statutory law and public policy against gaming." *Saratoga County Chamber of Commerce, Inc. v. Pataki*, New York Court of Appeals, Brief for Plaintiffs-Respondents in Action No. 1 (January 27, 2003) at 12. *See also* Oral Arg. Tr. (USET App. A, 25a) (plaintiffs seek ruling that gaming violates state constitution, because otherwise the legislature likely will ratify the Compact); *id.* at 25a-26a (if plaintiffs had a "magic wand," they would "close them down"); *id.* at 37a (plaintiffs claim New York Constitution bars legislature from remedying separation of powers problem by ratifying the Compact).[6]

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[4] References to App. A or App. B will be to the Appendix to the Petition for Certiorari filed by the Attorney General of New York.

[5] References to USET App. are to the Appendix attached to this Brief A*micus Curiae* filed by the United South and Eastern Tribes, Inc. in support of the Petition for Certiorari.

[6] The Appellate Division found that the gambling authorized by the Compact was "the antithesis of the highly restricted and 'rigidly

Footnote cont'd

The New York Attorney General argued, *inter alia*, that the tribe's sovereign immunity barred litigation of the suit. Despite its conclusion that the ruling it affirmed "speaks to the legality of the casino's operation, and thus affects the rights of each party to this suit," (App. A, 8a), the Court of Appeals held that the lower courts were empowered, under the state indispensable party rule, N.Y.C.P.L.R. 1001 (McKinney 1976), to proceed with the litigation in the tribe's absence. The court deemed the tribe's absence "excused," because the tribe could have waived its federal sovereign immunity and appeared as a party. (App. A, 23a). The court found that "IGRA does not preempt State law governing which State actors are competent to negotiate and agree to gaming compacts," (App. A, 25a), and found the issue too important to "permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court." (App. A, 22a).

The Court of Appeals' ruling purports to invalidate a federally approved agreement between an Indian tribe and a state, in the absence of both the tribe and the federal government. This Court should grant certiorari, because the Court of Appeals' rejection of the tribe's sovereign immunity conflicts with this Court's decision in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986). *Three Affiliated Tribes* held that where the tribe's interest is federally protected, a state may not require

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Footnote cont'd

regulated' . . . forms of gambling permitted by the N.Y. Constitution and statutory law and New York's established public policy disfavoring gambling." (App. B, 71a). The New York Court of Appeals declined to address the issue, citing another case pending in the lower courts in which the issue was squarely presented. (App. A, 29a). The dissenting judges would have addressed the state constitutional issue and found that IGRA preempts both the state constitution's anti-gaming provision and the "policy choices" the majority found that the governor ignored in signing the Compact. (App. A, 54a-61a) (Read, J., dissenting).

the tribe to waive its federal law sovereign immunity in order to protect that interest.

Intertwined with the sovereign immunity issue is an important federal question this Court should resolve, whether a state court adjudication of the validity of a federally approved gaming compact interferes with the comprehensive regulatory scheme set out in IGRA. *See Three Affiliated Tribes*, 476 U.S at 889-90 (Indian sovereignty and federal preemption are two ways of addressing the same supremacy issue). The state court's insistence on providing the plaintiffs a forum to decide a question of "State law" demonstrates its refusal to accept the preemptive force of IGRA. The state law issue arose only because a federal law – IGRA – conferred authority on the state to participate in the regulation of tribal gaming. Contrary to the Court of Appeals' view, there is no purely state law question in a challenge to the validity of a federally approved Tribal-State Gaming Compact.

This case is the appropriate vehicle in which to address the significant federal supremacy issues presented here. Although, in the absence of the tribe, no party had an interest in arguing that the state court adjudication interfered with the comprehensive federal regulation of Indian gaming set out in IGRA,[7] the Court of Appeals nevertheless addressed both the issue of sovereign immunity and the proper forum for a challenge to a federally approved gaming compact. (App. A, 23a, 25a). There will continue to be cases in which state courts adjudicate the validity of a tribal-state gaming compact in the absence of the tribe. Because the tribe will not be present to raise the federal issues, there may not be other

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[7] The New York Attorney General argued in the lower state courts that federal law preempted the state court action, but did not press that argument before the Court of Appeals. The Oneida Indian Nation filed a brief A*micus Curiae* in the Court of Appeals addressing the preemption issue. *See Saratoga County Chamber of Commerce v. Pataki,* New York Court of Appeals, Brief for Amicus Curiae Oneida Indian Nation (December 17, 2002) at 12-25.

cases in which the federal supremacy issues are as clearly presented as they are here.

REASONS FOR GRANTING THE WRIT

I. The New York Court of Appeals' decision that the Mohawk Tribe must waive its sovereign immunity in order to protect its interest in a federally approved gaming compact violates the Supremacy Clause

Federal law recognizes and protects tribal sovereignty. *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980). "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. *See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Sovereign immunity is not just a rule that prevents exercise of jurisdiction over the immune party. It bars a court from adjudicating significant interests of the immune party. Sovereign immunity is not subject to a balancing test, such as that used by the Court of Appeals when it permitted a state law indispensable party test to take precedence over federally protected sovereign immunity. (App. A, 22a) (under N.Y.C.P.L.R. 1001, factors favoring judicial review outweigh tribe's sovereign immunity).

Courts consistently have held that, where litigation affects significant interests of a sovereign, the litigation may not proceed. "The desirability for complete settlement of all issues between parties must, we think, yield to the principle of

immunity." *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940) (tribal immunity bars cross-claim against the United States, acting on behalf of tribe). Sovereign immunity trumps other considerations, even the absence of an alternate forum.[8] *See Oklahoma Tax Comm'n*, 498 U.S. at 514 (state may require tribe to collect tax on cigarettes sold to non-Indians, but sovereign immunity bars suit to recover tax from tribe); *see also Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (state indispensable to suit to force Secretary of Interior to publish notice of approval of gaming compact, even though dismissal would leave tribe without a remedy); *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 547-48 (2d Cir. 1991) (tribe indispensable to suit to compel renewal of leases to which tribe was a party); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 56 (D.D.C. 1999) (state indispensable to tribe's suit against Secretary of Interior, even though court "aware that the consequence of today's decision is that the [tribes] will have no access to the federal courts by which to vindicate their rights"); *Srader v. Verant*, 964 P.2d 82 (N.M. 1998) (tribes indispensable to suit seeking to prevent financial institutions from providing funding to the tribes' gaming operations). "[W]hen . . . a necessary party . . . is immune from suit, 'there is very little room for balancing of other factors.'" *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989). *See also Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (immunity is "one of those interests 'compelling by themselves'").

This Court need not decide whether federal law bars every state action that affects a significant tribal interest, although there would be compelling arguments in favor of such a ruling. The issue presented here is narrower -- whether

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[8] As demonstrated below, there was an alternate forum for plaintiffs' challenge. *Infra* at pp. 15-16.

a state, by application of its state indispensable party rules, may force a tribe to waive its sovereign immunity in order to protect its sovereignty over gaming activities conducted on Indian land. The answer to the question is compelled by this Court's decision in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1976), holding that where the tribe's interest is federally protected, a state may not require the tribe to choose between its federal law sovereign immunity and its other federally recognized interests.

The interests of the tribe at stake in this litigation are both significant and federally protected. The tribe, like any party to a contract, has an interest in a proceeding challenging the validity of the Compact. *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract all parties who may be affected by the determination of the action are indispensable."), *cited in Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-57 (9th Cir. 2002) (tribe indispensable to suit challenging hiring preference required by lease with tribe); *and cited in United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 481 (7th Cir. 1996) (tribe indispensable to suit to invalidate contracts to which tribe was party). Under the state court decision, the tribe will lose the benefit of the services the state agreed in the compact to supply to the casino. Oral Arg. Tr. (USET App. A, 8a) (state's view is that "if the Compact is voided, the state . . . officials . . . would be unable to perform their functions").[9]

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[9] Under the Compact, the tribe is entitled to seek arbitration and, if necessary, to sue the state in federal district court if the state does not provide the services agreed to in the Compact. Record on Appeal, at 1323-1325. Although the state court decision cannot be *res judicata* against the tribe, a federal court faced with a tribal action to enforce the

Footnote cont'd

There can be no suggestion that the State, as the other party to the contract, represents the interests of the tribe. The State had no interest in removing this case to federal court, where federal indispensable party rules would have compelled dismissal. *See supra* at pp. 6-7; *infra* at pp. 10-11. The State owes no trust obligation to the tribe.[10] Fundamentally, the interests of the tribe and the State are in tension, if not in conflict; if the tribe were required to renegotiate a gaming Compact in order to protect its multi-million dollar investment in its casino, the terms of the Compact might be considerably less favorable to the tribe. *See, e.g., Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49 (D.D.C. 1999) (after original Compact declared invalid, state legislature required that Compact include high revenue sharing and regulatory fees provisions; Secretary of Interior did not provide remedy and federal court could not hear tribe's suit because of state's sovereign immunity).

Footnote cont'd

Compact likely will feel constrained to avoid inconsistent judgments and defer to the state court judgment that the Compact is invalid.

[10] The Court of Appeals cited four cases as holding that "an Indian Tribe's absence due to sovereign immunity should not result in dismissal." (App. A, 23a, n.10). One of those cases was a state court decision that followed the reasoning of the Appellate Division in this case. *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W. 2d 474 (Wis. Ct. App.), *review denied*, 655 N.W. 2d 129 (Wis. 2002). The three federal cases were challenges, under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et. seq.* (2003) ("APA"), to decisions of the National Indian Gaming Commission ("NIGC") and the Secretary of the Interior allowing gaming under IGRA. The courts found that the interests of the NIGC and the Secretary of the Interior were substantially similar, if not identical, to those of the tribe. *Kansas v. Norton*, 249 F.3d 1213, 1227 (10th Cir. 2001); *Sac And Fox Nation v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1118-19 (E.D. Cal. 2002) (citing federal government's trust obligations to tribe).

The tribe's interest in this case is much greater than that of a party to a commercial contract. In IGRA, Congress affirmed "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands." S. Rep. No. 446, 100th Cong., 2d Sess., at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3075. The Court of Appeals' decision directly infringes on those sovereign rights and on the federal interest in preserving them.

There is no doubt that plaintiffs in this case, or other opponents of tribal gaming, will use this ruling to assert that Indian gaming is illegal. *See, e.g.,* Letter from Daniel T. Warren to Philip N. Hogen, Chairman, National Indian Gaming Commission (June 20, 2003) (USET App. B, 47a) (urging the NIGC to close the Mohawk and Oneida casinos, in light of the Court of Appeals' decision in this case). One federal court has held that a state court decision invalidating a gaming Compact also renders gaming illegal under IGRA. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) (Compacts not valid under IGRA because not valid as a matter of state law). *But see id.* at 1552, 1556 (United States asserts that Compact remains valid under IGRA because it is "in effect" once Secretary of Interior approves it; only way to challenge an approved Compact is to ask the Secretary to withdraw his approval). Whether or not the state court judgment ultimately results in loss of federal approval, the immediate impact of the declaration is to impair the tribe's ability to enter into continuing business relations and thus to impair the tribe's ability to continue its federally approved gaming.

Federal courts uniformly agree that sovereign immunity bars a court from litigating the validity of a gaming Compact in the absence of either of the parties to the Compact, even if the challenge is made, under state law, to the legality of the conduct of state officials. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (tribe indispensable to suit asserting that governor had

no authority to enter into gaming compact); *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1498-99 (D.C. Cir. 1995) (state indispensable to suit asserting that Compact was valid under federal law because it had been submitted to Secretary of Interior for approval); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 56 (D.D.C. 1999) (state indispensable to suit challenging Secretary of Interior's refusal to exercise authority to disapprove provisions of compact as contrary to IGRA). At least one state court has reached the same result, finding a tribe indispensable to a suit challenging the governor's authority under state law to enter into a gaming Compact. *State ex rel. Coll v. Johnson*, 990 P.2d 1277 (N.M. 1999). Two state courts, the Court of Appeals in this case and one other, have ruled, under state indispensable party rules, that a challenge to the validity of a gaming compact could go forward in the absence of the tribe. *See Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W. 2d 474, 486 (Wis.Ct. App.), *review denied*, 655 N.W. 2d 129 (Wis. 2002).[11]

This Court should grant certiorari to resolve the confusion among state courts over their ability to utilize a state indispensable party rule to require a tribe to choose between its federally protected sovereign immunity and other federally protected interests. In *Three Affiliated Tribes*, this

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[11] Two other state court decisions have proceeded, in the absence of the affected tribe, to address the authority of the governor to enter into a gaming compact, but they are procedurally distinguishable from this litigation. *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan.1992) was a mandamus/quo warrant action challenging the authority of the governor to enter into the compact. The action was brought before the compact was submitted to the Secretary for approval. *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995), issued mandamus, in the absence of the tribe, to prohibit the governor from implementing compacts he had signed. The New Mexico Supreme Court later distinguished *Clark* based on the peculiarities of mandamus, and found that the tribe's sovereign immunity required dismissal of a suit to declare gaming compacts invalid. *State ex rel. Coll v. Johnson*, 990 P.2d 1277 (1999).

Court rejected a state law that required a tribe to waive its sovereign immunity in all civil disputes as a condition of the tribe's right to sue non-Indians in state court. The Court found the state interest in its jurisdictional scheme "overshadowed by longstanding federal and tribal interests." 476 U.S. at 890. *See also Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996) (state *res judicata* rules generally left to the state, but application here deprived individuals of due process).

This Court should apply *Three Affiliated Tribes* to the state jurisdictional rule at issue here. If the balancing of interests required under N.Y.C.P.L.R. 1001 requires the tribe to waive its sovereign immunity in order to protect its sovereignty over its own lands, that rule is "overshadowed by longstanding federal and tribal interests," 476 U.S. at 890, and is preempted by federal law.

II. The New York Court of Appeals' conclusion that the public interest compelled it to provide a forum for resolution of this private litigation ignores the preemptive force of IGRA and the availability of other federal forums.

The state court strained its own indispensable party rules in order to provide a forum for the plaintiffs to challenge Indian gaming. Ignoring state precedent that a party to a contract is indispensable to a suit challenging the contract,[12] the state court decided to proceed without the tribe, because otherwise "no member of the public will ever be able to bring this constitutional challenge." (App. A, 21a). The state court's assertion of the public interest in providing a forum

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[12] *In re Application of McQuay Group*, 87 A.D. 2d 507, 447 N.Y.S.2d 473 (N.Y. App. Div. 1st Dep't 1982) (in an action to set aside a contract, the parties to the contract are indispensable).

for this private suit is both factually wrong and ignores the preemptive force of IGRA.

IGRA is a detailed and comprehensive federal regulatory scheme, intended "to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 446, 100th Cong., 2d Sess., at 6 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. Congress' intent was to promote tribal economic development, self-sufficiency, and strong tribal governments, to shield gaming from organized crime and other corrupting influences, and to establish federal standards and an independent Federal regulatory authority for gaming on Indian lands. 25 U.S.C. § 2702 (1) - (3) (2003).

IGRA attempts to encourage cooperation between tribal and state governments in the regulation of Indian casino gaming. S. Rep. No. 446, 100th Cong., 2d Sess., at 6, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3077. IGRA's compact requirement does not cede to the states the authority to regulate Indian gaming. Under IGRA, all of the final decision-makers are federal.[13]

A tribal-state gaming compact is solely a creature of the federal law creating tribal-state gaming compacts. Once federal approval of gaming has been given on the basis of the compact, the compact cannot be removed without disrupting the federal scheme. The validity of a federally approved gaming compact, therefore, is a federal question that must be decided, under federal law, in a procedure consistent with the

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[13] *See* 25 U.S.C. § 2715, 2710(e) (2003) (Chairman of NIGC must approve tribal gaming ordinance); *id.* § 2710(d)(8) (Secretary of Interior must approve tribal-state gaming compact); *id.* § 2713 (Chairman of NIGC may levy fines and issue order closing gaming in violation of IGRA). If the tribe and the state are unable to agree on a compact, the Secretary of the Interior may approve Indian gaming subject to regulations prescribed by the Secretary under IGRA. Class III Gaming Procedures, 64 Fed. Reg. 17535 (1999), 25 C.F.R. §§ 291.1-291.15 (promulgated pursuant to 25 U.S.C. § 2710 after this Court ruled that the tribe may not sue the state for failure to negotiate in good faith).

federal regulatory scheme.[14] *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055-56 (compact dispute between Band and State presents federal question; not state law question because compacts are created and defined by IGRA); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) (IGRA completely preempts state law challenges within its scope; state law challenges to conduct of lawyers in gaming license process are federal claims); *Narragansett Indian Tribe v. Rhode Island*, C.A. No. 94-0618-T, C.A. No. 94-0619-T, C.A. No. 95-0034-T, 1996 U.S. Dist LEXIS 11472 (D.R.I. Feb. 13, 1996) (unreported) (validity of compact under IGRA is a federal question; state law may be applied when the Compact has not been federally approved); *Mashantucket Pequot Gaming Enterprise v. Kennedy*, No. 116860, 2000 Conn. Super. LEXIS 679 (Conn. Super. Ct. Mar. 14, 2000) (unreported) (Tribal-State gaming compact entered under IGRA preempts state law regarding extension of credit for gambling).

The plaintiffs and the state court treat the issue of the validity of the Compact as if it could be surgically removed from the IGRA scheme without impacting that scheme. They ignore the fact that federal approval of Indian casino gaming assumes the existence of the Compact. By invalidating the Compact, the state court has confronted the National Indian Gaming Commission ("NIGC") and, potentially, a federal court with the questions whether the state court decision requires closure of the casino, or whether gaming

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[14] Even without IGRA, the validity of a compact between two sovereigns, the state and the tribe, would present a federal question. *See* S. Rep. No. 446, 100th Cong., 2d Sess., at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 ("the compact process is a viable mechanism for setting various matters between two equal sovereigns"). *See also West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts.")

nevertheless should continue, without the state support and regulation on which federal approval was based. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), (discussed *supra* at p.10). The fact that either choice interferes with the federal scheme illustrates the fundamental flaw in the state court's premise – that the public interest in resolution of the issue outweighs the federal and tribal interests that are impacted by, but not represented in the state court action.

The absence of a forum for this private suit is not an accident. Congress enacted IGRA fully aware that tribes cannot be sued without congressional or tribal consent. IGRA does not provide for individuals to bring any suit affecting Indian gaming. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir. 1995) (individual has no cause of action under IGRA); *American Greyhound Racing, Inc. v. Hull*, 146 F.Supp.2d 1012, 1053 (D. Ariz. 2001), *rev'd on other grounds*, 305 F.3d 1015 (9th Cir. 2002) (same). It does not give the state authority to regulate or enjoin Indian gaming, other than any regulatory authority agreed to by the tribe in the compact. *Florida v. Seminole Tribe*, 181 F.3d 1237, 1248 (11th Cir. 1999) (state may not sue to enjoin gaming in the absence of a compact); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059-60 (9th Cir. 1997) (same); 25 U.S.C. § 2710(d)(7) (2003) (state may sue in federal district court only to enforce the provisions of a tribal-state compact).

IGRA provides a comprehensive regulatory structure, designed to balance the interests of the states, the tribes and the federal government. *See* S. Rep. No. 446, 100th Cong., 2d Sess., at 3, 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3073, 3075. A private suit, under state law, challenging the validity of a federally approved gaming compact interferes with the balance of interests Congress struck in IGRA and, therefore, is preempted by federal law. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348, 351 n.6 (2001) (private suit challenging "fraud-on-the-FDA"

conflicted with "delicate balance of statutory objectives" in the Medical Device Amendments Act, 21 U.S.C. § 301, which gives enforcement authority only to federal government).[15]

The plaintiffs in this case had other options to challenge the Governor's authority to enter into a Compact without legislative approval. As the Court of Appeals noted, the Governor's action in signing the Compact was known to the public. Oral Arg. Tr. (USET App. A, 29a). The plaintiffs could have urged the Secretary of the Interior not to approve the Compact and could have sought APA review of his decision. *See Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) (plaintiffs card clubs and charities could seek review of Secretary's approval of gaming compact under APA). Instead, the plaintiffs waited six years to bring their challenge. By that time, federal approval had been granted, the federal regulatory scheme governing Mohawk casino gaming had been set in motion, and the multi-million dollar casino had been constructed. Even at the late date on which they commenced this suit, the plaintiffs could have requested that the Secretary reconsider his approval of the Compact, or could have requested that the NIGC order the casino closed. *See* 25 U.S.C. § 2713 (review of Commission's closure order in federal district court).

This Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), striking down IGRA's provision for a tribe to sue a state that fails to negotiate in good faith, gave the states an ability to block or delay Indian gaming that

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[15] *Buckman* was decided under rules less weighted toward preemption than those applied in cases involving Indian tribes. Where Indian interests are at issue, a finding of federal preemption does not depend on expressed Congressional intent, but on whether "[s]tate jurisdiction . . . interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

was not intended by Congress. States have exploited the leverage resulting from the unintended asymmetry in IGRA to obtain financial concessions from tribes. *See supra* p. 9 (discussing *Pueblo v. Sandia v. Babbitt,* 47 F. Supp 2d 49 (D.D.C. 1999)). If the decision of the New York Court of Appeals is left standing, the asymmetry will be compounded. Allowing private parties to invalidate an existing compact, on state law grounds, in the absence of the tribe, would force tribes to renegotiate existing compacts on terms set by the state or face closure of a tribal casino that was built at great expense and has been ongoing for years with full federal approval.

The lower courts are in disarray over the proper forum for and the relevance of a state law challenge to a gaming Compact on which ongoing federally approved gaming is being conducted. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002) (state separation of powers and state constitutional challenges to governor's authority to renew gaming compacts, brought in state court and removed to federal court, cannot be heard in absence of tribe); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) (giving effect to state court ruling that gaming compact invalid; result is that gaming is illegal under federal law); *id.* at 1552, 1556 (United States asserts that compact remains valid under IGRA because it is "in effect" once Secretary of Interior approves it; only way to challenge an approved compact is to ask the Secretary to withdraw his approval, with review under the APA); *Narragansett Indian Tribe v. Rhode Island*, C.A. No. 94-0618-T, C.A. No. 94-0619-T, C.A. No. 95-0034-T,1996 U.S. Dist LEXIS 11472, at *6-7 (D.R.I. Feb. 13, 1996) (unreported) (validity of compact under IGRA is a federal question); *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995) (compact approved by Secretary of Interior cannot be invalidated on basis of subsequent challenge to governor's authority), *aff'd,*77 F.3d 479 (5th Cir. 1996); *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474, 486 (Wis. Ct. App.), *review denied*, 655 N.W. 2d 129 (Wis. 2002) (state court can hear state constitutional

challenge to gaming compacts, in absence of tribe, despite recognition that "the tribes may be in a much better position than the Governor to advocate the supremacy of federal law in constraining a state's ability to curtail Indian gaming once Compacts have been entered into"); *Sarratoga County Chamber of Commerce v. Pataki*, (App. A 2a) (declaring Compact invalid under state law, on the assumption that declaration will undermine federal approval of the gaming, but without addressing that issue); *State ex rel. Coll v. Johnson*, 990 P.2d 1277 (N.M. 1999) (tribe indispensable to state law challenge to legality of legislation authorizing gaming compacts).

This Court should grant certiorari to clarify for the lower courts, state and federal, that a challenge to a federally approved Tribal-State gaming compact presents a federal question that must be addressed in a forum consistent with IGRA and that may be resolved only after consideration of all of the interests at stake: tribal, federal and state.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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October 15, 2003

APPENDIX A

NEW YORK STATE COURT OF APPEALS

Docket No.:

IN THE MATTER OF:

SARATOGA CHAMBER OF COMMMERCE, *et al.*
Appellant,

VS.

GEORGE PATAKI,
Respondent.

May 6, 2003

HELD AT: New York State Court of Appeals
New York, NY 10000

BEFORE:

APPEARANCES: ANDREW D. BING
Attorney for Appellants

CORNELIUS D. MURRAY
Attorney for the Respondent,
Saratoga County Chamber
of Commerce

JAY GOLDBERG
Attorney for the Respondent,
Wright, *et al.*

THE BAILIFF: The Judges of the Court. Hear ye! Hear ye! Hear ye! All persons having any business before this Court of Appeals held in and for the State of New York, may now draw near, give their attendance, and they will be heard.

[BREAK IN TAPE]

MR. NESSEX [PH]: Over and over again, this Court and the appellant divisions send these things back for [inaudible]—over and over again to say, "Do it again, you didn't do it right. It wasn't open enough—it wasn't detailed enough—it wasn't complete." But here, the [inaudible] didn't complain, and I think that's his principal problem.

FEMALE JUSTICE ONE: Thank you, Mr. Nessex [phonetic]. You didn't—

MALE VOICE: Did I not ask? I'm sorry.

FEMALE JUSTICE ONE: Saratoga County Chamber of Commerce v. Pataki. Mr. Bing, welcome back.

MR. BING: Thank you, Your Honor. Good afternoon, Your Honors, and may it please the Court. May I reserve five minutes for rebuttal?

FEMALE JUSTICE ONE: Yes.

MR. BING: There are three general topics regarding mootness that I would like to address this afternoon. The first deals with the 1999 Amendment, the second deals with the 1993 Compact, and the third deals with the concept of prospective injunctive relief, which was discussed in the submissions by plaintiff's counsel.

First, with respect to the 1999 Amendment—I put that first because I think that's probably the easiest case—that Amendment expired in the year 2000, and we are of the view that the portion of this action that challenges the validity of that Amendment is moot and the mootness exception does not apply to it. Even granting the importance of the issues at

stake, with respect to the Amendment, there is no assurance that the question of lack of legislative authority for the Governor's execution of a renewal Amendment will recur. The legislature has already authorized up to six [inaudible] Compacts and in laws 2001, Chapter 383, and there is no reason to believe that they would not necessarily—that they would not authorize a renewal Amendment. Moreover, this Court cannot assume that any renewal Amendment would evade review. Although the 1999 Amendment had a one-year term, the 2000 amendments that were rejected by the Interior Departments both had five-year terms. I believe there's a statement to the effect that they were one-year terms and—

MALE JUSTICE ONE: So what are you asking us to do about the 1993 Compact?

FEMALE JUSTICE ONE: What's moot about that?

MR. BING: I think the short answer, Your Honor, is that based on the submissions and based on Mr. Goldberg's statements, particularly at the argument in March, I think there still is a live controversy with respect to the validity of the 1993 Compact. We raised the question of mootness regarding at point four in our reply brief because there appeared to be some equivocal statements in the respondent's briefs in this Court, suggesting that perhaps the plaintiffs were willing to forego any relief with respect to the 1993 Compact, and we were afraid that—because we were convinced that the '99 amendment part was moot, and we thought that if the Court found this part also moot—the '93 Compact—the Court might moot the entire case. And in the event that happened, we thought the appropriate remedy was to reverse the orders appealed from and remit the matter to the appellate division for dismissal of the complaints on the grounds of mootness, and we believed this was inappropriate—this position—in the event the Court found the entire case moot.

FEMALE JUSTICE ONE: But you acknowledge at this point that the challenge to the 1993 Compact, Mr. Bing, doesn't raise an issue of mootness.

MR. BING: I believe that to be the case based on the statements and the submissions—particularly the submission of the Wright plaintiffs—and also based on Mr. Goldberg's statements here in March, where he seemed to continue to contest the validity of the 1993 Compact.

FEMALE JUSTICE ONE: So it's still a live controversy and you're not imposing any defenses of laches or statute of limitations or anything like that?

MR. BING: Oh, with respect to the 1993 Compact, we believe that this Court should reverse based on every argument set forth in our brief and our reply brief. We still believe that the Tribe was an indispensable party, this action never should have gone forward in the Tribe's absence, that the judgment below overwhelmingly prejudices the tribe, and that's the additional arguments made in the submissions and also in the briefs of the plaintiffs. That even with legislative authorization the Tribe would not be able to conduct Class Three gaming on its reservation pursuant to federal law also directly prejudices the Tribe's interests because it is completely—it's a direct affront to their power under federal law. Certainly, we think that that argument is still—obviously still helpful.

MALE JUSTICE ONE: We understand—

FEMALE JUSTICE ONE: I appreciate your statements, Mr. Bing, particularly in light of the sentence we quoted—or extracted—from your reply brief that led us to believe—or some of us—that you were claiming mootness as to the earlier one. I understand that had to do with the statements of your adversaries about no practical impact. Is that—is that how that all arose?

MR. BING: It arose—yes, it—

FEMALE JUSTICE ONE: So what do you say would be the practical impact?

MR. BING: With respect to the 1993 compact—

FEMALE JUSTICE ONE: Yes, yes.

MR. BING: And the existing judgment?

FEMALE JUSTICE ONE: Yes.

MR. BING: Well, as we set forth at length in both of our briefs, the effect of the judgment which declares that the Compact the Tribe negotiated with the State to be void and unenforceable I think has a number—there are a number of prejudicial impacts on the Tribe. I think first and foremost the Compact is the Tribe's ticket to gamble on its reservation in New York, and with a declaration of the Court—the Compact is void and unenforceable—imperils the Tribe's ability to continue to do that. I think the Ninth Circuit recognized that in the American Greyhound case.

MALE JUSTICE TWO: Does the Compact violate Article 1, Section 9?

MR. BING: Not in our view, Your Honor.

MALE JUSTICE TWO: Why not?

MR. BING: Because the—perhaps I should say that the—the overlay of federal law on existing New York law, which permits gaming—a substantial amount of lawful gaming in New York and IGRA—the Indian Gaming Regulatory Act—which says that the extent that gaming is allowed in the State for any—by any person for any purpose—that it is the subject of IGRA Compact negotiations—

MALE JUSTICE TWO: But you don't want us to reach that question.

MR. BING: I think the primary objection—although that issue has been asserted by the plaintiffs—the rulings of both courts—particularly Judge Teresi [phonetic] in Supreme Court, which was affirmed by the appellant division—although as counsel pointed out, the appellate division did, I think, in Dictiff [phonetic], suggest that they thought that the gaming was not consistent with Article 1, Section 9. But the primary thrust of this case has been the absence of legislative authorization for the—

MALE JUSTICE ONE: But that question goes to Article 1, Section 9. You are asserting that the Compact is constitutional and you want us to make a statement to that affect or just ignore it, period?

MR. BING: Well, I think if the Court finds—if this Court finds that the—agrees with us on any of our procedural challenges to this case, then I think that's the end of it. If you agree with us on indispensable party, or statute of limitation, or laches, or standing, then you don't reach either of the two merits questions.

MALE JUSTICE ONE: Suppose we disagree with you on all of the judicial challenges?

MR. BING: If you disagree with us on every procedural objection, and you agree with us that under separation of powers principle the Governor had the authority to sign a Compact, then I think certainly you could probably find the question as to whether this gaming was prohibited by the Constitution to be before you.

MALE JUSTICE ONE: That's the only question left, but if—conversely, if we disagreed with you on the procedural aspects and we further disagree with you on the checks and balances argument—this is all hypothetical, we're laying out all the options here—that would mean that we would not necessarily reach the constitutional question insofar as the constitutionality of gambling.

MR. BING: I think that's analytically correct as a logical matter; I would like to make clear what our argument—

FEMALE JUSTICE ONE: It's however, Mr. Bing, if the Court were to find that the Compact violates Article 1, Section 9, then legislative authorization wouldn't save the Compact, correct?

MR. BING: I guess that's true, which—

FEMALE JUSTICE ONE: And these may be questions more to ask your adversaries what it is they're looking for in terms of a remedy here, but ratification by the state legislature wouldn't assist the Tribe, correct?

MR. BING: If you find that the gaming—if you reject our argument on the IGRA in essence, it's supreme to the extent that it authorizes on-reservation gaming to the extent that that gaming is allowable in the State for any purpose by any person. If you reject that argument, then I think you're confronted with the question that this appears to be outside any of the Article 1, Section 9 exceptions.

FEMALE JUSTICE ONE: I'm sorry—

MR. BING: I'd like to make clear what our point is with respect to Article 1, Section 9, however—

FEMALE JUSTICE ONE: May I just ask one question sort of related back to what was happening—the ticket to gambling that you spoke about. Is it not true that as it stands now, since the 1999 Amendment has expired by operation of law, that there is illicit gambling going on in the casinos right now?

MR. BING: There is uncompacted—

FEMALE JUSTICE ONE: Uncompacted—

MR. BING: —[inaudible] electronic gaming going on, that is correct.

FEMALE JUSTICE ONE: So technically, they're in violation, right?

MR. BING: Because the gambling Compact—because the Amendments were not renewed there's—that's correct.

MALE JUSTICE ONE: So if we disagree with you on the—

MALE JUSTICE THREE: Federal law prohibits us—the State officials—from enforcing it, it's left to the Secretary to determine whether there's a violation, isn't it—the Secretary of the Interior—for which I would suspect there's a fairly substantial preemption question as to whether the State can stop the gambling on sovereign Indian land—isn't that the case?

MR. BING: Your Honor, I'm not positive what the answer to that question is. I don't think we have the criminal authority to go on the Reservation with respect to uncompacted gambling.

FEMALE JUSTICE ONE: I have a question about the practical effect, too. On the practical effect—let's say we disagree with you on the procedural issues and we disagree with you on the separation of powers—then what happens with respect to the racing wagering employees and the State Police investigations and all of these other regulatory functions that the State employees are performing—what happens with that, does that continue or does that not continue?

MR. BING: If you find that the—

FEMALE JUSTICE ONE: It's unconstitutional on whatever basis, I guess.

MR. BING: If the Compact is voided, the state—the state officials, I think, would be unable to continue to perform their functions. I think in our brief we said that in that event the tribal official—the tribal gaming authority—would take over

whatever functions. To the extent that gaming—plaintiffs have said that they're not seeking to enjoin the existing gambling operation apart from the electronic gaming—I think that what you would have under this scenario would be the unregulated on-reservation class III gaming. I think if you—if anything—and again, that's another harm to the Tribe because they bargained for the presence and for the—and the expertise of the state officials. I think without that they didn't get the benefit of their bargain, and I think that, again, another aspect of the prejudice of allowing this—you know, such a decision would have with respect to the Tribe—

MALE JUSTICE TWO: A question—would we be ignoring the State Constitution if we didn't rule it unconstitutional?

MR. BING: No, I think—I think—Judge Smith, I think, respectfully, it would be acknowledging the supremacy of federal law within the sphere of Indian relations. A situation which, under the Indian Commerce Clause, Congress has plaintive [phonetic] jurisdiction and has exercised it in IGRA to the extent of saying that to the extent that this gaming is allowed under New York State law to any person for any purpose, it must be the subject of an IGRA compact negotiation; and Congress has said, in that context, that where you have a state like New York, which has eight billion dollars a year of legal gambling in various different forms, you can't deny that kind of gambling—

MALE JUSTICE TWO: Including type III gambling.

MR. BING: Including class III casino gambling which is lawful—various types of that are lawful in New York already for specific narrow purposes. But the Mashantucket Pequot case that we cited in our briefs makes clear that merely because that the state limits on that kind of gambling cannot be applied to the Tribe is a take it or leave it proposition.

MALE JUSTICE THREE: Question, if there's to be a—and I'm not suggesting one way or another, but just as far as the options out there—a straight out affirmance would contemplate a rejection of the procedural impediments that have been raised—right? And also, it would connote a disagreement with your position on the separation of powers, would it not?

MR. BING: That's correct.

MALE JUSTICE: —Well—

MALE JUSTICE THREE: Would the—

MALE JUSTICE: Go ahead, I'm sorry.

MALE JUSTICE THREE: Would it then leave open to the legislature the possibility of determining whether they, as legislators, would, as a state, give the Indians the ticket?

MR. BING: No, the legislature already has—

MALE JUSTICE THREE: Not in this—not in the '93.

MR. BING: That's correct, not in this case.

MALE JUSTICE THREE: So would they be able to go back and determine whether the '93 type—the '93 arrangement—or they could renegotiate another one in the name of the legislature, given that an affirmance would apply—imply that they do—that the Governor did not have the power to do. So could they do it anew? Wouldn't that be the appropriate course?

MR. BING: Well, again, I think merely stating that remedy conclusively establishes that the Tribe is an indispensable party whose interests would be substantially prejudiced by any such ruling.

FEMALE JUSTICE ONE: We understand that argument, but still would be interested in your answer to Judge Rosenblatt's question.

MR. BING: If—if there was an affirmance, I think the affect of the affirmance would be, with respect to the '93 Compact, that the declaration that it is voided unenforceable would be affirmed. And if the injunction—the prospective injunction from Judge Teresi—would be affirmed, it would not necessarily require—I don't think—the renegotiation of the Compact. I think what it very well could require is, as I said earlier, it would affect our ability to—conceivably—to have—although I guess I must point out that plaintiffs initially said that they were not trying to pull our people out of the—

MALE JUSTICE THREE: You were about to finish the sentence. I'm waiting for you to finish the sentence.

MR. BING: I think the bottom line is that we would—arguably, there wouldn't be any authority for our people to be there anymore.

MALE JUSTICE THREE: Why wouldn't the legislature be able to do what—

FEMALE JUSTICE ONE: Couldn't the legislature—yeah, couldn't the legislature ratify it?

MR. BING: I think the legislature could ratify it ex post facto.

MALE JUSTICE THREE: Right, or start it all over again.

MR. BING: Al bonicio [phonetic].

MALE JUSTICE THREE: Right.

MR. BING: I think that's true.

MALE JUSTICE THREE: They could.

MR. BING: If—

MALE JUSTICE THREE: One more question on—

FEMALE JUSTICE ONE: Then it will not come as bad news to you, Mr. Bing that your time has expired. But Judge Rosenblatt had one last question.

MALE JUSTICE THREE: Another question, yeah, another question. On the—I didn't mean to imply that we're rejecting or that I am rejecting or anyone else is rejecting the procedural arguments. So I want to ask you about one of the procedural arguments which is—which is laches tied in with an indispensable party and what you characterize as prejudice to the Tribe. We know that the Tribe spent a lot of money—thirty million dollars or some figure in that neighborhood—and that you were arguing on their behalf—although they're not here and apparently they don't want to come in—that this would disserve them because they've expended all of this money. The other side says, "Well, they spent a lot of money, but presumably they're making back a lot of money as well"—under what they characterize as an illegal operation. So do we know, in terms of prejudice and harm, that even though they've put out thirty million, that they have not yet made back thirty million plus—maybe a lot more—do we know anything about that on this record?

MR. BING: I don't think we do, Your Honor, but I think—again, I think it's worth pointing out that the Tribe's—

MALE JUSTICE THREE: It goes to prejudice, does it not, because if they put out thirty and they made sixty that they were not entitled to, that has less appeal in terms of prejudice doesn't it?

MR. BING: Your Honor, the question of whether or not they're entitled to it is a question they're entitled to be heard on, and their absence from this case is not a result of their whim or caprice, it's a result of sovereign immunity—

MALE JUSTICE THREE: I understand—

MR. BING: —which society has recognized irregardless.

MALE JUSTICE THREE: I understand, but we don't know—in terms of the finances, we don't know whether that money was recouped—

MR. BING: No, we don't.

MALE JUSTICE THREE: —whether it's been lost.

FEMALE JUSTICE ONE: So Mr. Bing, that makes it impossible ever to challenge the authority of the Governor to separately enter into such a Compact, does it not?

MR. BING: We're saying, in this case, when the action isn't brought until nearly six years after the Compact is signed and when the Tribe has expended a substantial amount of money to open this casino in compliance with the Compact, that the tribe is an indispensable party and they—

FEMALE JUSTICE ONE: So they would not have been an indispensable party six years ago?

MR. BING: I think that each case requires examination under the factors of Section 1001 b—about the indispensable party. I think each case requires examination on its own facts and on its record.

MALE JUSTICE TWO: Well, why wouldn't they have been an indispensable party back in 1995 [inaudible]?

MALE JUSTICE THREE: But they would have the laches argument, wouldn't they?

MALE JUSTICE TWO: What would be different about your argument?

MR. BING: I think the argument of prejudice perhaps would be less compelling, given the fact that they had not yet opened the casino. But again, I think that this case—whatever the results may be in particular—other particular fact patterns in other particular records—

MALE JUSTICE TWO: Well, are you saying that they would not be indispensable at that time?

MR. BING: No, I'm not, Your Honor, I'm saying that you have to evaluate the facts of that particular case and look at the record in that particular case before making that determination.

MALE JUSTICE TWO: So they could have been indispensable at that time also.

MR. BING: Yes, absolutely.

FEMALE JUSTICE ONE: Thank you, Mr. Bing, you do have your rebuttal time. Mr. Murray.

MR. MURRAY: Yes, thank you, Your Honor. May it please the Court. It's nice to be back, although I must admit I hadn't expected to be back quite so soon. Your Honors, to expand on Mr. Bing's metaphor regarding the issue of the issuance of the ticket by the Governor. Our point in this case is where does the Governor derive the power to issue that ticket, and I respectfully submit—and there's three points I'd like to make in my time allotted, if I could—and that is number one, this action isn't moot, and even if it otherwise were, the three exceptions enunciated in the Hearst case dictate that it is not moot. And finally, even if you decide that Hearst doesn't apply, one of the things that Mr. Bing invited this Court to do is not only to declare it moot, but to take the extraordinary second step of vacating the lower court order. So we're urging—

FEMALE JUSTICE ONE: Mr. Murray, I wonder if you could add a fourth point, and it comes as no surprise I'm sure, when you hear several of us have asked about practical impacts here—were you to prevail, were there to be an affirmance.

MR. MURRAY: If there were an affirmance here, Your Honor, I think it depends on what the Court does. If the

Court says—what I'm asking the Court to do, by the way—to minimize the "harm" to the Tribe, not that we have to—but is not to even get into the problem of the '93 Compact. Simply say this issue is clearly before the Court on [inaudible] declaratory judgment action, because under a declaratory judgment action it's clear from previous decisions of this case—I've cited them in my supplemental letter to the Court—Nightburg v. Harriet Possman [phonetic]—that the classic use of declaratory judgment action is also to correct potential future wrong.

MALE JUSTICE FOUR: Well, that's interesting, because in Nightburg a majority of this Court dismissed the claim where people sought an advisory opinion with regard to the constitutionality of [inaudible] amendment and why would we—if you don't seek any—and this is what I need to know from you—do you seek an injunction precluding the expenditure of state funds with regard to any state involvement with the casino currently run by the St. Regis Reservation, yes or no?

MR. MURRAY: Yes, Your Honor—

MALE JUSTICE FOUR: So isn't that contrary then to the representation you made at the appellate division memorialized in the appellate division's decision?

MR. MURRAY: No, Your Honor, and here's why—what we're asking in our very narrowly tailored relief is to say the Racing and Wagering Board personnel can remain up there, they can appropriate—

MALE JUSTICE FOUR: Even though the Compact's unconstitutional, you would allow the expenditure of funds for an unconstitutional purpose?

MR. MURRAY: Minimize the affect—yes, Judge, insofar as it pertains to the original Compact.

MALE JUSTICE FOUR: Well, in your letter to us, you told us that we shouldn't—you made the analogy to a house of prostitution in the City of Albany—are you content with a little bit of prostitution on the St. Regis Reservation?

MR. MURRAY: Just to get back to my point Judge, here's what I tried to do—I tried to minimize the affect on the Tribe. Your point is well taken—

MALE JUSTICE FOUR: Well, you got a problem because the Tribe is an indispensable party and they're the only one who can assert laches and whether they're—whether they are—once you decide that they're an indispensable party, then it's a balancing of equities as to whether to continue with the lawsuit. But let me ask you one more question and then I'll leave you alone for two minutes—not forever.

MR. MURRAY: Sure.

MALE JUSTICE FOUR: You represent taxpayers and organizations—

MR. MURRAY: Right.

MALE JUSTICE FOUR: —and you're now saying to all of us—all seven of us assembled—that you're willing to allow the illegal expenditure of taxpayer dollars at Akwesasne, is that true?

MR. MURRAY: Insofar as it doesn't expand upon the original Compact [inaudible].

MALE JUSTICE FOUR: Then second of all, you're then willing to consent to have illegal gambling occur at Akwesasne, is that true?

MR. MURRAY: Insofar—that's true, Judge—

MALE JUSTICE FOUR: What is the harm then—the harm that you claim to create standing for taxpayers and those opposed to gambling—is it the illegal expenditure of taxpayer funds and gambling for those who find it morally repugnant

and unconstitutional? What is the standing of your clients when they—they consent to the very harm—I'm sure you have authority to say this—where they consent to the very harm that creates the foundation for their standing to insure us that this is a live case or controversy and not merely an opinion of this Court of what the law is, such that it might affect others not here before the Court?

MR. MURRAY: Fair question, Your Honor. I think it's—it's missing the point—it's the tail wagging the dog—to focus just on what's already happened. What we're trying to do is to prevent this from going any further. We don't want Racing and Wagering personnel up there monitoring an electronic gaming device that's illegal. What we've said is, "What's happened has happened." Okay, going into the future we'll concede that's a little inconsistent with our position, but our position is we're trying to tailor a relief here—a fashioned relief—that minimizes the impact on the Tribe, deals with the indispensability issue—although I don't think the Tribe is an indispensable party. But my point is, Judge, okay, what they've done is wrong; if you want to go for the equities of the Tribe and the Court is concerned about being unfair to a party that is not before the Court—okay, they've done that, but are we going to send additional Racing and Wagering personnel up there to monitor what's going to happen if they now engage in electronic gaming?

FEMALE JUSTICE ONE: Well, if this Court—if this Court declares the '93 Compact void and unenforceable—

MR. MURRAY: Right.

FEMALE JUSTICE ONE: —does the Tribe even have to allow Racing and Wagering employees on the Reservation or in the casino, and will they continue to turn over employee records to the State Police to conduct background tests? I mean this is, in terms of the practical ramifications—

MR. MURRAY: Sure, sure.

FEMALE JUSTICE ONE: —do they have to uphold their end of the bargain?

MR. MURRAY: They can't game anymore at all in that circumstance. This is the danger if this Court declares the '93 Compact illegal, and why—within the context of the declaratory judgment action—my position is we can forget '93 and go forward. Here's what happens—

FEMALE JUSTICE ONE: But, I thought that was the relief you were requesting, Mr. Murray?

MR. MURRAY: My relief—my relief says leave '93—

FEMALE JUSTICE ONE: You're not asking us to declare—

MR. MURRAY: I'm saying—I've said—I know—

MALE JUSTICE TWO: But you did originally.

MR. MURRAY: —jumping out of his chair at me.

FEMALE JUSTICE ONE: Well, I'm having a bit of a struggle myself listening to what you just said.

MR. MURRAY: Sure, here's the issue, Your Honor, if the—and also to further Judge Wesley's question—relative to—what a declaratory judgment—what's the relief that the party's entitled to in the context of the declaratory judgment action, and it's true, Judge, that in Nightburg they ultimately decided that they weren't going to go there, but they articulated the standard that they're going to address in every case and that is—not to take a long time here—when a party contemplates taking certain action, a genuine dispute may arise before any breach or violation has occurred and before there is any need or right to resort to corrective measures. Here's my point, this is not some wonderful, abstract, law school academic question.

MALE JUSTICE FOUR: Could you read the—Mr. Murray, I, you know, I—that's an interesting sentence, but

how about the sentence before it, "The court should not perform useless or futile acts and thus should not resolve disputed legal questions unless this would have an immediate, practical affect on the conduct of the parties."

MR. MURRAY: Right.

MALE JUSTICE FOUR: But you've eviscerated the request for immediate or practical affect. Let the Aquisassy Casino continue to be open, let state taxpayer dollars continue to fund illegal and unconstitutional activity. I submit to you, sir, that standing—and ask you—is not standing—which insures a live case or controversy—predicated upon injury?

MR. MURRAY: Judge—

MALE JUSTICE FOUR: Yes?

MR. MURRAY: Yes, but it's going to get worse. Here's what I'm saying, you don't have—say, "Look, forget it, Mr. Murray, we're going to go after the '93 Compact—so be it"—what my concern has been, Judge, all along is that we're sort of being penalized here for not going after the death penalty and asking to shut down—

MALE JUSTICE FOUR: I know you're confronted—you're confronted with a sovereign defendant that you can't get into court, and then you've got an indispensable party argument.

MR. MURRAY: And I can appreciate that your attempt—because you're a darn good lawyer—to craft the limitations and what you request, but every once in awhile, after you've pared enough of the onion, there's no onion left. And so one last thing, and I—because you've expressed yourself very clearly on this—and articulate—in essence, what you say is, is that your concern is, "Look, we've got this sovereignty thing here that's not going to—that's going to keep us at bay, and so therefore let the '93 agreement go." Now, you've then decimated what you've asked for, but you say, "Well, it's into

the future and we can't get to it quick enough." And I ask you, have you read Johnson v. Pitaki where District Attorney Johnson sought to prohibit the Governor from appointing a special prosecutor in a death prosecution?

MR. MURRAY: I haven't read that.

MALE JUSTICE FOUR: Attorney Johnson brought an Article 78 proceeding and was able to accomplish judicial determination of the respective rights of the parties within a very short period of time. Would you now have Article 78 relief—I realize that may make this action untimely—but would you not have Article 78 relief where you contend, pursuant to Article 78, Subdivision 3, I think it is—78.01 Subdivision 3—that the act is illegal, and could you not seek injunctive relief prohibiting that illegal act, which would inherently have within it the necessity of declaring and determining the rights of the parties, and would you not then have an accelerated mechanism begun by an order to show cause prohibiting the governor—immediately upon signing an individual Compact with another Tribe—from doing anything further until after courts have looked at it?

MR. MURRAY: Before—before the Governor has acted?

MALE JUSTICE FOUR: The day that he signed—it's served him.

MR. MURRAY: Oh, the day—the day he—well, right then, Judge, here's what I think the dilemma is for the Court—you have to—you have to then deal that indispensability issue right away. Here's what I'm saying to the Court, if you—

MALE JUSTICE FOUR: I agree, and is it not true that the indispensability here becomes a problem for you because of laches. But laches are a function of time and if this—if this problem is identified at the time of signing the document, laches becomes irrelevant.

MR. MURRAY: Indispensability is an issue at all times, Judge. It's an issue—

MALE JUSTICE FOUR: Absolutely, but determining whether to dismiss on indispensability is a function of discretion in weighing at least four or five factors as enumerated in the statute.

MR. MURRAY: Correct—by the way, the mere fact that the party can't be before the Court is not dispositive.

MALE JUSTICE FOUR: And but for—and but for the fact that the nation—there's a substantial—the appellant division agrees so—in fact the appellant division does an interesting analysis—"Geez, laches is a really viable defense, but well, it's only available to the Tribe and they're not here so we don't have to worry about it." But—

MR. MURRAY: If laches is a defense, which it's not, Judge—I respectfully submit—because it's continuing wrong issue. They got it wrong going into the future and I gave a couple of dramatic hypotheticals—

MALE JUSTICE THREE: They were good hypotheticals. I don't have one to refute them; otherwise I would have given you one.

FEMALE JUSTICE ONE: Mr. Murray, I'm getting lost here, quite frankly, have—are you backing away from your contention that there was a constitutional violation here?

MR. MURRAY: No, I'm sorry Judge, I didn't mean for a moment to suggest that. What I'm suggesting here is that in the context of an Article 78 proceeding, to get around the advisory issue that Judge Wesley is so concerned about, the cases are clear that if it's not a hypothetical situation—this case has context and texture. We know that the Governor has done it twice, he's threatened to do it a third time—that's at page 1746 of the Record—the affidavit of Mr. Williams has indicated twice already the Governor has unsuccessfully tried

to pursue another amendment and Mr. Williams is telling us that he is negotiating a third one.

FEMALE JUSTICE ONE: Well then, I'm still a bit at sea, Mr. Murray, because as I understand it you would be willing to blink at the existing one, you're just worried about future ones.

MR. MURRAY: Sure, sure.

FEMALE JUSTICE ONE: Is that an accurate statement?

MR. MURRAY: Yes, Judge.

FEMALE JUSTICE ONE: So then why don't we face the issue when there is another one?

MR. MURRAY: Because, Judge, this is the window of opportunity that we spoke about—or that I spoke about in my supplemental letter. Because the indispensability argument, in order to have traction, has to have an adverse affect upon a party not before the court—that's the whole theory—the underlying predicate for indispensability. Right now, we have this unique window of opportunity. That unique window of opportunity is this amendment has expired, so I'm saying, "Okay, we don't want to jeopardize any vested rights of the Tribe because we don't want to run into the indispensability argument should the Court say it has any traction." Right now, all we're saying is, "Don't sign anything in the future." No Tribe—not the Mohawks nor any other Native American Tribe—claim right now that they're adversely affected—

MALE JUSTICE FOUR: You want us to advise the Governor not to do this in the future?

MR. MURRAY: Yes, and Judge—

FEMALE JUSTICE ONE: Is the reason—is—

MR. MURRAY: [Interposing]—advisory. Here the point is we know from the Governor's track record that he's done it twice and he's going to do it again.

MALE JUSTICE FOUR: Well, my recollection is Governor Cuomo did this twice, and I haven't seen a signature by Governor Pitaki on anything yet.

MR. MURRAY: This isn't about Governor Cuomo or Governor Pataki—

MALE JUSTICE FOUR: No, well, you said "this Governor"—I was—the only governor I know right now is Governor Pataki.

MR. MURRAY: Well, Judge, Governor Pataki in fact did try to amend it twice—

FEMALE JUSTICE ONE: [Interposing] Mr. Murray, what's the base—what's the basis that—we—Mr. Murray, what's the basis that we would be advising the Governor that he can't negotiate in the future? That it's a violation of the separation of powers or because the—

MR. MURRAY: Both.

FEMALE JUSTICE ONE: —Compact itself is unconstitutional.

MR. MURRAY: Yes.

FEMALE JUSTICE ONE: So the your posture would be that the legislature can't ratify the '93 Compact nunc pro tunc. You'd have a different response than Mr. Bing had.

MR. MURRAY: Oh, yes, there's no question, Your Honor, as I think you pointed out, legislative gratification is a nullity if it's unconstitutional. Legislatures can only do what the Constitution—

FEMALE JUSTICE ONE: [Interposing] Well wait a minute, I thought the reason you were arguing it was

unconstitutional was that the legislature hadn't authorized it. So if the legislature authorizes it, doesn't that take away your unconstit—your argument.

MR. MURRAY: Judge Reed—Judge Reed, we argued both. We—

FEMALE JUSTICE ONE: But we don't have to agree with you on both, we can agree with you on one and not the other.

MR. MURRAY: As Judge Rosenblatt, I think, was getting there, Judge Kay, he was asking, "Do we have to get to the second one or can we defer that another time?" The answer to that is I'd really like the Court to do both here. Because let us assume, for example—

FEMALE JUSTICE ONE: I understand that you might like it, Mr. Murray, but we don't have to do it.

MR. MURRAY: No, of course not.

FEMALE JUSTICE ONE: And were we to reach only the first question and then I return to Judge Reed's question, then legislative ratification would be appropriate.

MR. MURRAY: Let me suggest why—as I think Judge Wesley asked in the oral argument the first time around. He said, "Do we have to cross two constitutional bridges or just one?" And here's what I'm saying, let us assume—I think this is a realistic scenario in light of what's happened in this case—that you were to decide, "We're sorry Governor Pataki, but the separation of powers says you can't do this so Judge Teresi's injunction exists, and you don't go further, you don't address the second constitutional question—which it's certainly there's a lot of cases that say courts don't have to address other constitutional issues if they don't need to. But, in the context of this case, what if the legislature turns around next week and in response to the Court's decision says, "Okay, Governor Pataki, you're hereby given the legislative

authorization." As they did with Chapter of 383 of the courts of 2001, which doesn't address these particular Compacts—which was Judge Suparick's [phonetic]—

MALE JUSTICE THREE: That would then raise for the first—that would then raise a question of the constitutionality of gambling per se of the Constitution.

MR. MURRAY: Correct. That's absolutely right.

MALE JUSTICE THREE: So let me ask you this question, and, Tom—

MR. MURRAY: And—and—may I just—I don't mean to interrupt you, Judge, I'm sorry, but—

MALE JUSTICE THREE: Please—sure, go right ahead. No problem.

MR. MURRAY: The problem is, Judge—Judge Pataki—or Governor Pataki might well do that then because that's exactly what the legislature after Justice Teresi acted. They said, "Okay, he didn't have legislative authorization. We were going to give it to him in the other ones." So they did it right away and low and behold Judge—or Governor Pataki then entered right into a Compact. So what I'm saying to you is, if this Court stops and just stops at the separation of powers argument and doesn't go the next step, the legislature might well pass a law—particularly given right now their concerns about budget and revenues—they pass it, Governor Pataki then inks a Compact before we get back here, and then you're faced with the problem again—which we're faced with now—of dealing with another issue—

MALE JUSTICE THREE: [Interposing] Right, well I think everybody understands that, there's always a balance dealing with expediency and efficiency on the one hand, and decision making and the proper constitutional deference on the other hand. My question to you is this, can I ask whether I understand your position correctly in that if you had a magic

wand you would close them down, but that your concern that this Court may not have the wish to do that considering that the prejudice may be too severe, so you're willing to take half a loaf and close them down for the future only. Does that summarize your position?

MR. MURRAY: It does, Judge, because not only does it—it stops them from expanding, but it stops any further violation of the Constitution.

MALE JUSTICE THREE: Okay, all right.

MALE JUSTICE FOUR: So given that that's your position, I have to ask you then—

MR. MURRAY: In terms of your response to questions about advisory opinions, what is your position as to the mootness advisory opinion—justiciability—however you want to denominate it—in light of the concession by the State that this is a live controversy? The State has told us that this is a live controversy, so how does your—how is your position affected by the very candid concession by the State of New York?

MR. MURRAY: If—Judge, you know, if it's a live controversy you don't have to worry about my argument.

MALE JUSTICE THREE: That's—that's—I wanted to see what the discussion—there seemed to be a serious debate about something which appears to have been conceded. I just want to clarify that.

MR. MURRAY: It would be extremely presumptuous for me to try to give Mr. Bing's argument for him, and he's an extremely worthy adversary so I don't have to do that—

MALE JUSTICE THREE: But we heard him three times say that—that it's a live controversy.

MR. MURRAY: But were I to state—I wouldn't—I wouldn't be inviting this Court to take on the whole issue

because I strongly feel that if the Court wants to take the whole ball of wax and declare the '93 compact illegal, that's fine with me. I suggest you don't have to do that. To be Solomononic [phonetic] if you will—

MALE JUSTICE THREE: Then what do we do about—

MR. MURRAY: —if you will, cut the proverbial baby in half.

MALE JUSTICE THREE: Then what do we do about the appellate division decision? Vacate it, ignore it?

MR. MURRAY: Modify it if you will, Judge, I—

MALE JUSTICE THREE: And declare that it was constitutional—modify it in what way?

MR. MURRAY: No, to—I would modify it by simply deleting the termination insofar as the '93 Compact is concerned, but leave—

MALE JUSTICE TWO: So we're finding that that was constitutional, isn't that the effect of what you're saying?

MR. MURRAY: Basically what the appellate—the key, Judge Smith, is Judge Teresi discerned the forest from the trees. He made a decision not only as to the Compacts, but within the power that was given to him under the CPLR with respect to a declaratory judgment action, he said, "Look, I don't have to just tailor my relief to precisely what's narrowly in a declaratory judgment complaint, I have the ability and latitude—as a judge does in a declaratory judgment action—to give complete relief." So he said, "And I further enjoin the Governor from taking any further action absent legislative authority." That's the part that I don't understand. That's the war, it's not the battle. This is a war about—in metaphorical context—this is a small battle—the '93 Compact—that's [inaudible]—

MALE JUSTICE THREE: [Interposing] But your companion here wants it all taken down and he's eager to say so I imagine, so is this—I don't see anything wrong with this, it strikes me as lawyer-like. He wants to take them down and you're willing to say half a loaf. So you're giving us an option. Is that what this is all about?

MR. MURRAY: Yeah, I—

MALE JUSTICE THREE: You can tell us candidly, we're lawyers, we understand these things.

MR. MURRAY: Sure, I don't want to take the whole thing down because I don't think you have to do that to the Tribe. I'm not coming here piously saying I'm a great advocate for the Tribe, there are—forget about the legalities, there are equitable arguments here that the Tribe entered into a Compact in 1993 and they spent thirty million dollars—

FEMALE JUSTICE ONE: It sounds like you're saying they're an indispensable party.

MR. MURRAY: No, I'm not, Judge. No, no, I'm not going that far.

FEMALE JUSTICE ONE: Thank you, Mr. Murray.

MR. MURRAY: Thank you, Judge. I—let me—let make that unequivocally clear, but the point, Judge is—Mr. Goldberg—and again, I wouldn't assume to speak for him as well—I don't think this Court has to do that to the Tribe. I think we have done enough if we say, "What's gone is gone, it's too bad, it should never happen, but please, let's draw a line in the sand here and let's not it happen again."

FEMALE JUSTICE ONE: Thank you, Mr. Murray.

MR. MURRAY: Thank you, Your Honors.

FEMALE JUSTICE ONE: Mr. Goldberg.

MR. GOLDBERG: Yes, and very important point, Judge Rosenblatt, everybody's been talking about equity, [unintelligible], there is at 398 a letter to the Governor from his counsel in 1993. It says very clearly that all throughout the St. Regis—it's at 403—and that is why from the outset of negotiations with the St. Regis Mohawks and with the Nation last summer, the State's negotiators told the Indian counterparts that legislative approval would be required before the State could enter into effect—

MALE JUSTICE THREE: [Interposing] You say they knew—you're saying they knew they were on thin ice. I just had a question on it—it's just a point of curiosity—that letter from Liz Moore [phonetic], how did that surface? Was that made public? I would think that when counsel speaks with the Governor, that would have remained within the confines of the Governor's office. How did that letter reach the light of day, do we know? It is not going to affect the outcome of this case, I can assure you that. I was just curious.

MR. GOLDBERG: No, we don't.

FEMALE JUSTICE ONE: Mr. Goldberg, regardless of how that letter now appears in the record, at some point in 1993, you clients became aware that the Governor signed this Compact.

MR. GOLDBERG: Yes.

FEMALE JUSTICE ONE: And they didn't bring an Article 78 at that time claiming it was illegal.

MR. GOLDBERG: They didn't and you might say—

FEMALE JUSTICE ONE: [Interposing] Isn't that, I mean—

MR. GOLDBERG: —it was a laches—it was a laches if this case was treated as a narrow case. This case is bigger than the Indians. This is whether the Constitution confers on the Governor the right of Compact-making.

FEMALE JUSTICE ONE: Right, so why—why didn't they sue immediately when it was signed. Why do we wait six years?

MR. GOLDBERG: I can't answer that.

FEMALE JUSTICE ONE: If in fact it went to the fundamental nature of either separation of powers or whether the Governor could even sign a Compact because the Constitution didn't authorize this type of gaming.

MR. GOLDBERG: Yes. That is a problem, but for a case cited in this Court—decided in this Court on assumption of the risk. All I can answer is that Ms. Moore from the outset of negotiations repeatedly told the Tribe—

MALE JUSTICE FOUR: Well—now wait a second—no, that's not—that's not—just to be fair, sir, Ms. Moore's letter relates a third-party conversation alleging—now I don't recall Ms. Moore advising the St. Regis, but let me ask you this—if you had brought your Article 78 at the time that the Compact was signed in 1993, regardless of what Ms. Moore said—or what anyone said to the St. Regis Reservation—would not the St. Regis Mohawks have clearly been on notice that a court in New York was going to adjudicate the legitimacy of the Compact—wouldn't it?

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: And therefore, had they proceeded to go ahead and build a casino and operate it, they would have done so at their peril, wouldn't they?

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: However, what they did do was they operated under the assumption—their own assumption—perhaps wrong—that the Compact was valid. Indeed the Secretary of the Interior had approved it, and they went ahead and they conducted gaming, and now six years after the fact, your clients seek to have a declaration that that's illegal.

MR. GOLDBERG: Yes, but we don't ask that it be torn down.

MALE JUSTICE FOUR: No that's—now here's my question to you—the same as Mr. Murray—do you, sir, seek to have injunctive relief with regard to the closing of the casino?

MR. GOLDBERG: No.

MALE JUSTICE FOUR: Do you seek to prohibit the expenditure of state funds with regard to the interrelationship with state agencies with Akwesasne Casino?

MR. GOLDBERG: Yes, that's in our complaint, and, Judge—

MALE JUSTICE FOUR: Yes or no?

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: You do?

MR. GOLDBERG: Yes, and Judge Teresi said, "The defendants are enjoined from expending any state funds."

FEMALE JUSTICE ONE: So what is it exactly that you say would follow if you were to prevail?

MR. GOLDBERG: Well the—

FEMALE JUSTICE ONE: At the casino?

MR. GOLDBERG: —1993, as my adversary says, is a live controversy—

MALE JUSTICE FOUR: That's because of the letter that he got that he got from Mr. Murray saying that he was backing off his request for prospective injunction—or that he wasn't seeking—that he was seeking to not close the casinos. What I need to know from you is—and—what I need to know is you do seek injunctive relief out of this case?

MR. GOLDBERG: As Judge Teresi recited and as our complaint recited—

MALE JUSTICE FOUR: As affects state—the expenditure of state funds—

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: —with regard to the interaction of state agencies and the St. Regis and the operation of the Akwesasne Casino.

MR. GOLDBERG: Yes, and if you look at the complaint—

FEMALE JUSTICE ONE: So you're—just to follow-up with my question, so I'm very clear on the practical implications of the relief you request, you would close the casino?

MR. GOLDBERG: Well, that's not so. The practical affect might be if you can't spend state funds then you'd have a problem with the casino—

MALE JUSTICE FOUR: That's a very bright answer, but the reality is that the direct answer to the chief question—to the Chief's question is that it would effectuate the closing of the casino.

MR. GOLDBERG: That's possible.

MALE JUSTICE THREE: You want an affirmance—does it—an affirmance declared—the appellate division declared the Compact null and void. Do you or do you not want that affirmed?

MR. GOLDBERG: I want that affirmed.

MALE JUSTICE THREE: You want it affirmed, so if we affirm, it means that the Compact is declared null and void. What happens thereafter, Lord knows, but that's what you're looking for. Do we have that clear?

MR. GOLDBERG: That's—

MALE JUSTICE THREE: So not perspective only, but a declaration of null and void means—means in the past as well.

MALE JUSTICE FOUR: On the [unintelligible]?

MALE JUSTICE THREE: Does it not? You want an affirmance.

MR. GOLDBERG: This is what the appellate division said.

MALE JUSTICE FOUR: Right.

MR. GOLDBERG: —declared the 1993 Compact and its amendment void and unforceable. Now perhaps I've not presented this the way I wanted to—

MALE JUSTICE THREE: We'll get there, we'll figure out what—

MR. GOLDBERG: Now the Preamble, Your Honors—that's why I say it's longer—the Preamble to the Constitution says, "We the people in order to secure our freedom do adopt this Constitution."

FEMALE JUSTICE ONE: Are we talking about the Federal Constitution?

MR. GOLDBERG: State, State—the State Constitution. I thought of going to the Preamble because I liked what was in the Federal Constitution. Sure enough there's the same kind of language. The question is whether, if you don't resolve this case, assuming that the 1993 is a live controversy, are you saying that the Governor has compact-making authority, whether it be Indians or any other subject. There is no court in the country that adopts that approach. The Governor, it is clear, does not have—the Constitution does not confer on the Governor the right to act alone to make compacts. At page thirty-two of my brief there is like forty compacts entered

into. It requires legislative consent, the Governor—unless this Court acts in what he says is a live controversy—then there'll be no guide to future conduct, and that's what Your Honors have said is an important consideration when you think about mootness.

MALE JUSTICE FOUR: Well, concessions don't create justiciability. Justiciability goes to the very power of the court and so that conclusion is ours and ours alone. Not anyone else's or the interpretation of what people say—but what I ask you is this—and you're both very able—all of you are very, very able, but we don't—this isn't—you don't put in your nickel and get an opinion from this Court. This Court requires live controversies in the sense that people have real disputes and that there are real things on the line because we require it so that it sharpens the analysis. It is the underpinning of our ability to resolve matters. We resolve disputes, and yet you and your co-counsel have removed the dispute because you wish a declaration that the agreement is illegal, but you seek no enforcement from it. And so what more is it than we are saying, "Well, this is an illegal agreement, but, by the way, everyone in the State of New York, we're not going to allow you to do anything about it." I know of no other case, ever in this Court, where this Court has said, "Well, that's illegal, but no one, none of you, not anyone in this lawsuit, not anyone else in the state, no one can shut Akwesasne down or seek injunctive relief.

FEMALE JUSTICE ONE: That's not how I understand your position, Mr. Goldberg.

MR. GOLDBERG: That's not—it's not—

FEMALE JUSTICE ONE: You—you—in fact I perceive there's a difference between you and Mr. Murray, so—

MR. GOLDBERG: Yes, look what the Court did—Judge Teresi—he prohibited the expenditure of state funds. Now where did he get that? That's in our complaint. And you say,

most respectfully, all we want is a declaration that the 1993 Compact is void with no further action, most respectfully.

MALE JUSTICE FOUR: Well, I asked you if you wanted an injunction directing the closing of Akwesasne, and you said, "No."

MR. GOLDBERG: No.

MALE JUSTICE FOUR: But then you said, "But I do want to prohibit the expenditure of state funds." Which in essence closes Akwesasne.

MR. GOLDBERG: We don't know that—we don't know that, and remember I had mentioned to—

MALE JUSTICE FOUR: A good reason for the Tribe to be here, wouldn't it? To know what the effect of our relief would be.

MR. GOLDBERG: There's a broader issue, I think the main issue is the interpretation—the construction of the Constitution. I think—I may be wrong—but I think the issue is much more substantial in terms of what our Constitution requires. Without making a rule with respect to future conduct—and the 1999 expiration does not make this moot—in the case that you decided, East Meadow in 18 N.Y.2d, Pete Seeger was to perform on June 1st—June 1st came, they wouldn't let him perform because [unintelligible] they thought he had communist tendencies. He didn't perform on June 1st, it didn't get to the courts until December, and the courts—the lower courts—said, "Well, it's moot, June 1st is past." And the Court said, "No, this is a substantial issue, likely to recur and we must deal with it."

MALE JUSTICE FOUR: Well, a performance is a little bit different than a contract. A contract exists—this contract has been in existence since 1993—

MR. GOLDBERG: Did you say—

MALE JUSTICE FOUR: Contract exists every single day and doesn't avoid the ability of the determination of whether it's legitimate or constitutional or not, unlike a performance or prohibiting a performance would—might do. So—

MR. GOLDBERG: But this is much more important. Did you say—forgive me, did you say "contract"? The Pete Seeger case is less important than this one.

MALE JUSTICE FOUR: No, I didn't say that at all, in fact, I would suspect that the Pete Seeger case is extremely important. But what I'm suggesting to you is that to understand mootness, one looks and sees whether it avoids review. I don't view—to be honest with you, I don't view this case as moot other than the '99 case, I view this as whether it's a live case or controversy or justiciable. After that, then I have serious questions about whether you can sit around for six years and say, "Well we don't have to worry about laches because they're not here." As the appellate division said.

MR. GOLDBERG: And—and—

MALE JUSTICE FOUR: You know, because the State of New York happens to be sovereign with regard to lawsuits, too. The State of New York can't be dragged into every court necessarily, and the federal government has decided to make the Indian Tribes sovereign. Whether we like that or not, that's a federal choice.

MR. GOLDBERG: But didn't—then you would ignore what Ms. Moore said occurred by the negotiations.

MALE JUSTICE FOUR: I certainly would not, but I would certainly want all the parties present before I decided to evaluate that.

MR. GOLDBERG: Well, of course that's their choice, but what is the issue in this case? I haven't made it clear, and that is what does our Constitution—what did the people—

FEMALE JUSTICE ONE: Well, let's say we agree with you, let me ask you the question—I don't think anybody's asked you this one yet—we've asked some of the others.

MR. GOLDBERG: Let's say we agree with you, then can the legislature just turn right around and fix it by ratifying the Compact?

MR. GOLDBERG: On the—

FEMALE JUSTICE ONE: We agree with you—let's say we agree with you, we reach the merits, we agree with you that there's been a violation of separation of powers—

MR. GOLDBERG: Let me answer it this way—I believe Article 1, Section 9 creates an impediment in this way—and I mentioned it last time—I have mentioned that I saw the Tuckbill's [phonetic] volumes and [unintelligible] prohibited since 1824—but certainly our Constitution was enacted in 1894.

FEMALE JUSTICE ONE: So what, your answer is no, because commercialized gambling is banned by the Constitution—is that your answer?

MR. GOLDBERG: Yes, except with an amendment in three areas—it's been amended—paramutuals, lotteries, and—what's the third-

MALE VOICE: Bingo.

MR. GOLDBERG: Bingo—and other than that it is a total ban, and that's why the judge of the appellate division said commercialized gambling is the antithesis—said—commercialized Las Vegas type gambling—which class III is, roulette wheel, baccarat, everything we see in Las Vegas—is the antithesis of the highly regulated scheme set out in our constitutional framework. It said—

FEMALE JUSTICE ONE: So then the legislature then can't ratify the '93 Compact.

MR. GOLDBERG: With respect to gambling, I say they can't. With respect any other Compact, they can.

MALE JUSTICE FOUR: Okay, so if and when—

FEMALE JUSTICE ONE: If they passed a budget bill with an appropriation in it, is that illegal also? Is that an inappropriate—improper appropriation?

MR. GOLDBERG: That doesn't constitute ratification. I think the court below is correct. I think the issue is—

MALE JUSTICE FOUR: Well, the question was whether it's improper or not.

MR. GOLDBERG: Yeah, it—it—

FEMALE JUSTICE ONE: Because for the six years that you didn't challenge this Compact, there were state appropriations.

MR. GOLDBERG: Yes, yes.

FEMALE JUSTICE ONE: Isn't it desirable, Mr. Goldberg, for you to have resolution of the separation of powers issue?

MR. GOLDBERG: Obviously. I think we're all looking at this wrong—most respectfully—in too narrow a focus. Certainly it's likely to recur, unless we—this is an important controversy unless the Governor has guidance—which is one of the exceptions to the mootness—unless there be guidance as to future conduct, does the Constitution give him the power to make Compacts with any sovereign—New Jersey, Canada—does he have that?

MALE JUSTICE THREE: Your position is this should be affirmed—I just want to get that straight—your—it should be affirmed.

MR. GOLDBERG: Of course.

MALE JUSTICE THREE: And that would leave open the question of whether gambling is constitutional under—under—under the anti-gambling provision of the New York State Constitution, which may or may not be left open for another day.

MR. GOLDBERG: Yes.

MALE JUSTICE THREE: In the exchange with Judge Smith there was question of whether we should reach that point—whether we should reach that decision even though it is not as heavily briefed as the separation of powers point. So that the options are, in the event we agree with you, either to affirm and leave for another day the question of whether the gambling per se provision of the Constitution is—was breached or that we reach it, in the event we agree with you, and make a determination on that as well. Is that your—

MR. GOLDBERG: Yes, I think you've stated it, as usual, perfectly. But, Judge—may I say this—is it likely to recur, Judge Wesley—two governors, four thrusts at this approach—that they had the authority to act alone, that the Constitution confers that power on them. As I told you, every court in the country says that were there are no—where there is a Constitution with enumerated powers to the governor, the governor doesn't have the right to make Compact—are we to leave open as to whether the Governor has deferred upon him compact making? Take every one of the first [inaudible].

MALE JUSTICE: [Interposing] [Inaudible].

MR. GOLDBERG: Look at them, the footnote—the magnificent footnote—this case comes squarely within those—

MALE JUSTICE TWO: It's—I'm sorry—in the appellate decision, the court said this Compact is against Article 1, Section 9. If we affirm, that means we are agreeing that it's unconstitutional—the compact and the gambling.

MR. GOLDBERG: The appellate division didn't say that.

MALE JUSTICE TWO: Well, "Under the circumstances, we conclude that the commercialized Las Vegas style gambling authorized by the Compact is the antithesis of the highly restricted and rigidly regulated Constitution Article 1, Section 9, forms of gambling permitted by the New York Constitution."

MR. GOLDBERG: Judge Smith, if that's taken as a holding, yes, and affirmance on that ground would be appropriate. We argue that at the very least it required approval of the legislature, or, on the other hand, the Governor is not free to act for the state as though he were the state. And there's a footnote in Seminole [phonetic] by Chief Justice Renquist in which he says it is not conceivable that an individual could consider himself the state, and there must be something more. And, as I've said to you before, every state that's considered this is in accord. I'm going to leave you with this, I know my—

MALE JUSTICE THREE: You keep on talking about separation of powers, and Judge Smith's question is whether an affirmance would take within it's scope a declaration of unconstitutionality under Article 1—that's what he—so—

MR. GOLDBERG: Yes, it would vindicate—vindicate the will of the people that there is a difference between Article 3 and Article 4, that no one may usurp—you know, the statements of constitutionality are so eloquent—eloquently made by this Court that I'm not going to improve upon them.

FEMALE JUSTICE ONE: You were going to leave us with something Mr. Goldberg.

MR. GOLDBERG: I have to—you know, I came from California for this so I'm trying to get my money's worth, and now I have to go back.

MALE JUSTICE FOUR: Mr. Goldberg, I know you're going, but let me ask you one last question—293 App. Div. 2d, quote, "It is important to note plaintiffs did not seek to shut down the Tribe's casino located on Akwesasne Reservation. Insofar as that it is operated in accordance with the original Compact." Of course, we know that in the original Compact there are—it provides for the expenditure of state monies. Do you repudiate that statement?

MR. GOLDBERG: Yes.

MALE JUSTICE FOUR: Okay.

MR. GOLDBERG: May I just say this to you?

MALE JUSTICE FOUR: So the appellate division is either in error or it was never right.

MR. GOLDBERG: Or—or—and look at the—

MALE JUSTICE FOUR: Fair enough.

MR. GOLDBERG: Judge Wesley, if you'll look at the affirmance, the affirmances of Judge Teresi—you have to see what Judge Teresi said—

MALE JUSTICE FOUR: I have to read what the appellate division wrote as the premise for its relief so—

MR. GOLDBERG: And you have to look at our complaint.

MALE JUSTICE FOUR: You say that misstates your position at the appellate division?

MR. GOLDBERG: Yes and—no, it states our position before Judge Teresi; the appellate division affirmed what Judge Teresi did.

MALE JUSTICE FOUR: Fair enough.

MR. GOLDBERG: I mean it is an unhappy situation; it could have been done earlier. But whether it could have been

done earlier or not, we're dealing with—I'm sorry to say—the vindication—the protection of a Constitution, and that to me, sir, is quite a difference than a laches coming up in the course of a commercial contract. If this isn't a substantial matter involving the construction of a Constitution, then I don't know what is. There will be no limit to what can be done by a Governor who thinks he can engage in compact-making on his own without the legislature—just on his own.

FEMALE JUSTICE ONE: Thank you.

MR. GOLDBERG: As Governor Cuomo—

FEMALE JUSTICE ONE: Thank you, Mr. Goldberg. Mr Bing?

MR. GOLDBERG: Thank you, Your Honor. Oh, by the way, I've prepared a chronology—would anybody like that? I served it on everybody, it just has dates and—

FEMALE VOICE ONE: Does your adversary have any objection?

MR. BING: Your Honor, we had an opportunity to make written submissions last week, everything in the chronology is in our briefs, I believe.

MR. GOLDBERG: I thought it would make it easier for you.

MALE VOICE: Fair enough.

MR. GOLDBERG: Don't want it? Okay.

MR. BING: Your Honor—thank you, Your Honor. I think that everything that particularly counsel for the Wright plaintiffs, Mr. Goldberg, just said, I think emphasized the prejudice that is inherent in this case to the Tribe, and I think establishes the Tribe's indispensability and the reason why, at this stage, this action should have been dismissed on indispensability.

MALE JUSTICE FOUR: As to Mr. Murray's concessions, is there a live controversy—in your view?

MR. BING: My concessions regarding the live controversy focus primarily on what Mr. Goldberg said in his response.

MALE JUSTICE FOUR: All right.

MR. BING: I'm troubled by Mr. Murray's argument that there's something to prospective injunctive relief here. I think that the prospective injunctive relief, to the extent that it—all the Court would be saying is that defendant's must obtain legislative authorization for future compacts—I think would be a futile gesture because we've now been advised that the compact is void for want of an authorization the legislature was powerless to give. So I think that any such an order would be completely futile on the part of the Court, and again, I would point out the necessity of such prospective injunctive relief is probably—and it's been called into question by the fact that Chapter 383 shows that future compacts may well have the imprimatur of the legislature. So as far as this action is about lack of legislative authorization, I submit that the question of recurrence just may not be here.

FEMALE JUSTICE ONE: No, but insofar as the validity of the 1993 Compact as challenged, there certainly is a live controversy, isn't there?

MR. BING: Certainly Mr. Goldberg seeks to void the 1993 Compact and terminate the expenditure of funds to the casino pursuant to it, which I do think would likely have the effect of closing the casino. Certainly, it would have the effect of depriving the Tribe of the benefit the bargain had struck. I think it's important to emphasize again the issue of statute of limitations and laches. As Judge Wesley pointed out, the courts—the [inaudible] reasoning on—

MALE JUSTICE FOUR: It will predetermine the decision with regard to turning-stone [phonetic] also, will it not?

MR. BING: I would prefer not to take any position with respect to turning-stone. I will say that turning-stone was signed—that the Oneida Compact was signed in 1993—

MALE JUSTICE FOUR: By the Governor alone.

MR. BING: —by the Governor alone. I believe their keno was open earlier and we—

MALE JUSTICE FOUR: And they were sued six years almost—within—almost—close to six years the day of the original opening of the casino, were they not?

MR. BING: Are you talking about the Oneida casino?

MALE JUSTICE FOUR: The Oneida case was commenced just shortly before the six-year statute expired.

MR. BING: I think—Your Honor, I don't remember exactly when the—

MALE JUSTICE FOUR: Well, it's contained in the affidavit of the application in the Oneida Nation's amicus standing in this, so it's a matter of record before this Court and it's unrefuted.

MR. BING: It's in their brief, I think yeah. I mean, you've heard from the Oneidas. I think that it's important to emphasize that delay here would be extremely prejudicial, and that together with our mootness argument with respect to the 1999 Amendment—and again, I think for the reasons I indicated earlier—the exception doesn't apply to the 1999 Amendment. I think that is a way of addressing this case, certainly not the only way. We set forth in addition to indispensable party, also standing arguments and our merits arguments which in our brief went to the question of separation of powers, but also to the legitimacy of the IGRA process, which is what's been challenged by the argument

that the gaming is illegal. The fact is, as I said earlier on, under the supremacy clause with effect to commerce for the Indian Tribes Congress has plenary authority, and they've exercised it here. And to the extent that IGRA looks to state law, state law allows massive amounts of legalized gambling, and the Compact that was negotiated—the 1993 Compact—has followed the IGRA blue-print in authorizing only gaming that was already lawful in New York State for some person for some purposes, or could have been authorized by the Racing and Wagering Board without further—

MALE JUSTICE THREE: Mr. Bing, if we disagree with you on the separation of powers argument, what is your position as to whether we should reach the second constitutional question?

MR. BING: Judge Rosenblatt, I think that what the Third Department said in its opinion regarding the nature of this gaming is probably—[inaudible] in the sense that the holding they affirmed did not reach that issue.

MALE JUSTICE THREE: It's hard to really put your finger on what—on the solid nature of that—or what was intended.

MR. BING: I would respectfully suggest that this case is really about legislative authorization. Subsequent cases where the issue perhaps more squarely is presented may be the forum for which that question gets resolved. Obviously, if the Court feels it must address it, then I believe that the Court should find that the gaming is legal.

MALE JUSTICE THREE: Is legal.

MR. BING: For the reasons set forth in our brief.

MALE JUSTICE THREE: Are we able to make a determination like that based on a record in which there are all kinds of games that—there's a whole assortment of games and it's hard to tell which fall into the authorization and

which do not. Are we able to make a determination like that here, do you think?

MR. BING: I think the record shows, Your Honor, and I think we said this in our brief, that the games that were authorized pursuant to the Compact, were those that were either already allowed under the Racing and Wagering Board regulations for charitable purposes or those that the Racing and Wagering Board could have allowed without further legislative action and thus were within the executive sphere of influence.

MALE JUSTICE THREE: So it's basically your view that we let that—that we leave that question alone.

MR. BING: I think—again, respectfully, I think this case—if the Court should focus on the authorization issue I think there are other cases that may present more squarely the question of the legality of the gaming. I think, as I said earlier, that if the Court finds that it must address the issue, then I would certainly urge the Court to find that the gaming is legal.

FEMALE JUSTICE ONE: Thank you, Mr. Bing.

MR. BING: Thank you very much, Your Honors.

BAILIFF: All please rise. Hear ye! Hear ye! Hear ye! All persons having any further business before this Court of Appeals of and for the State of New York may depart hence and appear here tomorrow afternoon at two o'clock at which time this Court now stands adjourned.

FEMALE JUSTICE ONE: Good afternoon.

[END OF HEARING]

APPENDIX B

[LOGO]

Upstate Citizens for Equality
Niagara Frontier Chapter
836 Indian Church Road
West Seneca, NY 14224-1235
http://www.nfc-uce.net

June 20, 2003

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, NW
Suite 9100
Washington, DC 20005

Dear Chairman Hogen:

I am writing to you today on behalf of the members of Upstate Citizens for Equality regarding the recent ruling of the New York Court of Appeals in the matter of Saratoga County Chamber of Commerce v. Pataki and its effects on Class III gaming in the Mohawk and Oneida casinos. In this decision the Court declared invalid the 1993 compact entered into between the Mohawks and former Governor Cuomo. Therefore any Class III gaming occurring at the Mohawk casino is in violation of the IGRA.

Since this decision declared that the governor of our state cannot enter into any gaming compact without legislative approval, and that all lower courts are now bound to this principle by the doctrine of stare decisis, any casino conducting Class III gaming in the absence of such legislative approval is also in violation of the IGRA.

Therefore we are requesting that you take immediate action to order the Mohawk and Oneidas to cease and desist from conducting any Class III gaming until such time that they obtain legislative approval.

Sincerely,

/s/ Daniel T. Warren
DANIEL T. WARREN
Chairman
Niagara Frontier Chapter of Upstate Citizens for Equality

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